Supreme Court, U.S.
FILED

97 2016 JUN 12 1998

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No. 98-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

ARIADNE FINANCIAL SERVICES PTY. LTD.
AND MEMVALE PTY. LTD., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR A WRIT OF CERTIORARI

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72 pp

QUESTIONS PRESENTED

1. When is the Tucker Act's six-year statute of limitations period triggered in a contract action?

2. Is the Government's stated intention to enforce a regulatory regime which is inconsistent with its contractual obligations sufficient to trigger the Tucker Act's statutory limitations period?

LIST OF PARTIES

Petitioners, Ariadne Financial Services Pty. Ltd. and Memvale Pty. Ltd. were appellants below. Respondent, the United States of America was appellee below.

Petitioners are wholly-owned subsidiaries of Ariadne Australia Limited (CAN 010 474067), a company incorporated in the state of Queensland, Australia. Ariadne Australia Limited has issued shares to the public, and is listed on the Australian Stock Exchange.

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UNITED STATES OF AMERICA, *Respondent.*

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The Petitioners, Ariadne Financial Services Pty. Ltd. and Memvale Pty. Ltd., respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit, *Ariadne Financial Services Pty. Ltd. v. United States*, is reported at 133 F.3d 874 (Fed. Cir. 1998) and is reprinted in the Appendix (App. A at 1a-10a).

The opinion of the Court of Federal Claims, *Plaintiffs in Winstar-Related Cases v. United States*, is reported at 37 Fed. Cl. 174 (1997) (App. B at 11a-44a).

JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit was entered on January 6, 1998. A timely Petition for Rehearing or, in the Alternative, Suggestion for Rehearing In Banc, was denied on March 17, 1998 (App. C at 45a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 2501 states in relevant part: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."

STATEMENT

1. Introduction

This case arises out of the Government's breach of its contract with Petitioners Ariadne Financial Services Pty. Ltd. and Memvale Pty. Ltd. (collectively "Ariadne"). Ariadne was one of many investors who were induced to acquire failed or failing savings and loans in the mid-1980's by the Government's promise that those savings and loans would be accorded favorable regulatory treatment, including the ability to count an asset commonly known as "supervisory goodwill" towards their capital requirements. The Financial

Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989) ("FIRREA"), mandated that these regulatory practices be phased out over a five-year period. As a result, a large number of thrifts became insolvent and many of the thrift investors, including Ariadne, suffered huge financial losses.

This Court, in *United States v. Winstar Corp.*, 518 U.S. 839 (1996), held that the Government was liable for damages for breach of contract for eliminating the favorable regulatory treatment it offered to induce investors like Ariadne to assume the liabilities of failed or failing savings and loans. This Court rejected the Government's contention that "special rules, not generally applicable to private contracts, govern enforcement of the governmental contracts at issue." *Id.* at 860. The Court held instead that the standard rules of contract breach applied to the agreements. *Id.* at 843.

In this case, the Federal Circuit held that Ariadne's cause of action for breach of contract against the Government was barred by the Tucker Act's six-year statute of limitations. In so holding, the Federal Circuit disregarded this Court's instructions in *Winstar* by failing to apply generally applicable rules governing the accrual of contract claims. The Federal Circuit held that the statutory period began running when Ariadne had "notice" of the Government's intention to phase out the use of supervisory goodwill. This holding confounds the concept of breach of contract with the concept of anticipatory repudiation and is in conflict both with canonical contract law and the way other Circuits have treated *Winstar*-type claims. Notification of a contracting party's intention not to perform does not begin the running of the limitations period. The statutory period does not begin until there has been an unequivocal repudiation treated as a breach by the non-breaching party. In

this case, this occurred, at the earliest, when the Government first *enforced* FIRREA's new rules against the relevant savings and loan, which was less than six years before Ariadne filed its lawsuit.

The Federal Circuit's opinion is significant in that it applies not only to all *Winstar*-related cases, but to *all* contract claims that come before the Federal Circuit and the Court of Federal Claims. Given that the majority of contract claims against the Government are brought in the Federal Circuit, the failure of that court to adhere to generally applicable principles of contract law creates a particularly dangerous precedent. Absent review by this Court, the Federal Circuit's decision will distort the rules that govern a large portion of contract suits against the Government.

2. Factual And Procedural Background

In the face of mounting thrift bankruptcies in the mid-1980's, the Federal Savings and Loan Insurance Corporation (FSLIC), seeking to limit the Government's insurance liability, encouraged healthy thrifts and outside investors to take over ailing institutions in "supervisory mergers." FSLIC encouraged these supervisory mergers by entering into agreements with investors promising that the savings and loans would be accorded favorable regulatory treatment, including the ability to count an asset commonly called "supervisory goodwill" towards their capital requirements. *See generally Winstar*, 518 U.S. at 848-49. Ariadne was among hundreds of investors that entered into such arrangements with the Government.

In April 1987, Ariadne entered into a series of transactions in which it provided a total of $36.9 million to purchase Southern California Savings and Loan ("SoCal") from Government receivership. As a condition of the transactions, the Government agreed that SoCal could count supervisory goodwill toward its minimum capital requirements and amortize it over a period of 25 years.

On August 9, 1989, FIRREA was signed into law. FIRREA adopted minimum capital requirements that prohibited the use of supervisory goodwill, with the result that a large number of thrifts that had entered into agreements with the Government could no longer comply with the regulatory minimum capital requirements. The Office of Thrift Supervision ("OTS") issued regulations, which became effective on December 7, 1989, implementing these changes in regulatory accounting practices, and issued a "Thrift Bulletin" on January 9, 1990, informing thrifts that the new regulations applied to thrifts operating under the previously granted capital and accounting forbearances.

SoCal was informed by OTS that it was not in compliance with FIRREA's capital requirements in early 1990. In accordance with OTS regulations, SoCal submitted a capital restoration plan in January 1990, which was amended on March 2, 1990. As a matter of law, the plan sought an exception from FIRREA's capital directives. OTS approved the plan on April 18, 1990. Implementation of the plan constituted the very first direct effect of FIRREA and the regulations upon SoCal's business operations. Before that date, it was not certain that SoCal's business practices were going to be permanently altered by FIRREA's new capital requirements.

In late 1990, the OTS informed SoCal that it was out of compliance with the April 18, 1990 plan. In response,

SoCal submitted a revised capital restoration plan, which the OTS rejected. In 1992, SoCal sought additional capital through a recapitalization that subordinated Ariadne's interest in the thrift to new investors. This was followed by a second recapitalization in 1995, precipitated by the OTS's issuance of a Prompt Corrective Action Directive. As a result of the second recapitalization, Ariadne was forced to redeem its shares in SoCal—representing a $36.9 million investment—for $50,000.

Ariadne filed suit in the Court of Federal Claims, under 28 U.S.C. § 1491, on April 16, 1996, alleging breach of contract and takings claims against the Government. This was less than six years after April 18, 1990, the date the Government first imposed restrictions on SoCal's business practices in violation of its contractual commitments. The Government moved to dismiss Ariadne's action and 25 other *Winstar*-related cases on the ground that they were filed more than six years after FIRREA's effective date of August 9, 1989, and thus were barred by the Tucker Act's statute of limitations. The Court of Federal Claims rejected the Government's contention that plaintiffs' causes of action had accrued as of the effective date of FIRREA, but nonetheless held that two of the cases (including Ariadne's) were barred by the statute of limitations because they had been filed six years after December 7, 1989, the effective date of the OTS's implementing regulations. *See Plaintiffs in Winstar-Related Cases v. United States*, 37 Fed. Cl. 174 (1997) (App. B at 11a).

The Federal Circuit affirmed the decision of the Court of Federal Claims, but never determined the date on which the *Winstar* plaintiffs' causes of action actually accrued. *See Ariadne Financial Servs. Pty. Ltd. v. United States,* 133 F.3d 874, 880 (Fed. Cir. 1998) (App. A at 9a). Instead, the Federal Circuit held that Ariadne's breach of

contract claim was barred because Ariadne was on "*notice*" of its claim on some unspecified date prior to March 2, 1990, the date SoCal submitted an amendment to its first capital restoration plan to the OTS. *See* App. A at 9a-10a. The Federal Circuit never addressed the fact that, until January 1, 1991, the Director of the OTS had the discretionary power to fully except thrifts from regulatory compliance, which would have permitted the Government to meet its contractual obligations. Applying a test for accrual of a contract cause of action that had no grounding in contract doctrine, the Federal Circuit simply held that Ariadne "should have known" that SoCal had lost the benefit of counting supervisory goodwill towards its capital requirements sometime before March 2, 1990, and therefore all of Ariadne's claims were time-barred. *See* App. A at 10a.

REASONS FOR GRANTING THE WRIT

THE FEDERAL CIRCUIT VIOLATED *WINSTAR'S* INSTRUCTION TO APPLY BASIC CONTRACT DOCTRINE TO THE GOVERNMENT'S CONTRACTS

This Court has long held that "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Lynch v. United States*, 292 U.S. 571, 579 (1934); *see Winstar*, 518 U.S. at 895 & n.39 (and cases cited therein); *Perry v. United States*, 294 U.S. 330, 352 (1935). *Winstar's* central lesson was that this principle applies to Government contracts that not only "deal[] with regulatory change but allocate[] the risk of its occurrence." *Winstar*, 518 U.S. at 907.

A. Under Basic Contract Doctrine, Notice Of An Intention To Breach Does Not Trigger The Limitations Period.

The Federal Circuit did not determine at what point the government breached its contract with Ariadne, but simply found that Ariadne was *on notice* that supervisory goodwill would be phased out *in the future* at least as of the dates that the OTS issued a notice of intent to enforce FIRREA's capital requirements and SoCal submitted its amended capital plan on March 2, 1990. Thus, the Federal Circuit stated (133 F.3d at 879-80, App. A at 9a-10a) (emphasis added):

> Before April 16, 1990—the critical date for this filing—the government had enacted a statutory prohibition on the use of supervisory goodwill and issued regulations enforcing this prohibition. It then issued a *notice of intent* to apply these regulations to thrifts, including SoCal. . . . This Court need not determine today precisely which act constituted the government's *repudiation* of its contract obligations. For the purpose of resolving the present dispute it is enough to note that SoCal was sufficiently convinced that supervisory goodwill was no longer available to it as an asset by March 2, 1990 [the date SoCal submitted an amended capital restoration plan to OTS]. . . . By that time, Ariadne knew or should have known that SoCal had lost this asset. Ariadne filed suit more than six years after this date.

This holding is contrary to settled contract doctrine. It is hornbook law that where performance is still possible,

notification of a contracting party's *intention* not to perform is an anticipatory repudiation of a contract, and the non-repudiating party may: (1) treat the contract as terminated and sue for breach; (2) urge retraction of the repudiation; or (3) ignore the repudiation. *See* E. Allan Farnsworth, *Farnsworth on Contracts* § 8.22 (1990).

As this Court stated in *Dingley v. Oler*, 117 U.S. 490, 503 (1886), in order for a repudiation to constitute a breach, "[the repudiation] must be a distinct and unequivocal absolute refusal to perform a promise, and *must be treated and acted upon as such by the party to whom the promise was made*" (emphasis added). If the non-repudiating party does not treat the repudiation as a breach, the statute of limitations does not begin to run at the time of the repudiation (Arthur L. Corbin, *Corbin on Contracts* § 951 (1st ed. 1951) (emphasis added)):

> [A]n anticipatory repudiation is a breach for which an action will at once lie, and yet it is reasonable for the injured party to continue to demand performance and to hold open the opportunity for retraction of the repudiation. *In such a case the statutory period is held not to begin to run until the day set for the actual performance promised or until the injured party has definitely expressed his intention to regard the repudiation as a breach.*

The Federal Circuit's holding that notice of an intention to breach is sufficient to start the statutory period cannot be explained in light of generally accepted contract principles. Under those principles, Ariadne could have elected to treat the Government's stated intention to breach

as a breach or (as it did) await the Government's actual non-performance. *See Tretchick v. Dep't of Transp.*, 109 F.3d 749, 752 (Fed. Cir. 1997); *United States v. DeKonty Corp.*, 922 F.2d 826, 828 (Fed. Cir. 1991); *Anaheim Gardens v. United States*, 33 Fed. Cl. 773, 777 (1995). After the OTS informed SoCal that it was out of capital compliance, SoCal urged retraction of the Government's repudiation, and submitted a capital plan that sought an exception from FIRREA's minimum capital requirements. Only when the OTS implemented the revised capital plan, thereby directly imposing regulatory restrictions on SoCal that were inconsistent with the Government's contractual obligations to recognize supervisory goodwill, was the contract irrevocably breached.

Under the Federal Circuit's ruling, the mere announcement of regulatory change by the Government, as opposed to the actual enforcement of the regulatory scheme against particular participants, becomes the triggering event for the statute of limitations. This Court should correct that error because it impacts upon every regulatory change made by the Government that affects its obligations under a preexisting contract. In this instance, both FIRREA and the regulations constituted anticipatory repudiations of the contract terms, which did not affect Ariadne concretely until, at the earliest, April 18, 1990, when the OTS determined not to except SoCal from FIRREA's capital requirements and acted upon SoCal's capital plan.[1]

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1 Unlike the Federal Circuit, the Court of Federal Claims did recognize the distinction between anticipatory repudiation and breach, holding that the enactment of FIRREA constituted only an anticipatory repudiation and that the effective date of the implementing regulations constituted the breach from which the statute of limitations ran. That court did not, however, provide a

B. The Federal Circuit's Holding Is Contrary To FIRREA's Regulatory Scheme.

The Federal Circuit ignored the date on which the OTS responded to SoCal's capital plan—its first direct enforcement action on the thrift—but instead attached great significance to the date of the *submission* of the amendments to SoCal's plan—March 2, 1990—reasoning that SoCal certainly had notice by that date that it would no longer be permitted to count supervisory goodwill towards its minimum capital requirements. The court's reasoning ignores the indisputable fact that, even as of March 2, 1990, the OTS had authority to grant exceptions from FIRREA's minimum capital requirements until January 1, 1991. Thus, it was not certain until the OTS actually acted on SoCal's capital plan that the breach would occur.

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logical reason for treating the former as an anticipatory repudiation and the latter as a breach. The Claims Court stated that "FIRREA was essentially a *legally binding forecast* of a future breach of the forbearance agreements." *Plaintiffs in Winstar-Related Cases v. United States*, 37 Fed. Cl. 174, 183 (1997) (App. B at 27a)(emphasis added). That court further noted that "the content of FIRREA's terms is irrelevant to the accrual inquiry—what matters is not the substantive terms by which the plaintiffs' rights were circumscribed, but *the timing of the circumscription itself.*" *Id.* at 184 (App. B at 27a) (emphasis added). This same reasoning applies to the promulgation of the regulations, which simply put meat on FIRREA's statutory bones, as well as to the Government's other acts of "forecasting" prior to the date it acted on SoCal's capital plan.

Under 12 U.S.C. § 1464(t)(8), the Director of OTS was empowered to "make exceptions to the capital standards prescribed under paragraph (1) [the capital requirements] for eligible savings associations. No exception under this paragraph shall be effective after January 1, 1991." Even after that date, OTS could still grant exemptions from FIRREA's non-compliance sanctions. *See* 12 U.S.C. § 1464(t)(7)(A), (B) ("Any savings association not in compliance with the capital standards prescribed under paragraph (1) [the capital requirements] may apply to the Director for an exemption from any applicable sanction or penalty for noncompliance which the Director may impose under this Act."). Thus, while there is no question that thrifts across the country were on notice of the Government's intention to phase out supervisory goodwill when FIRREA was enacted or soon thereafter, no thrift was required to treat its contract as terminated until OTS (1) determined whether and to what extent a particular thrift would be granted an exception to or exemption from the revised capital requirements, and (2) imposed restrictions on the thrift's business practices.[2] FIRREA's capital requirements were not

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2 Indeed, in briefs filed in a number of early *Winstar*-related cases, the Government argued that plaintiffs' claims were not yet ripe even after the Government had clearly signaled its intention to breach its contracts, precisely because the OTS had not yet determined whether or not to except a thrift from the newly enacted regulatory capital requirements. Thus, the Government asserted that "the fact that the FDIC and the OTS have the authority to take appropriate action in the future [to except thrifts from regulatory compliance] does not make plaintiffs' claims ripe at present," *Franklin Fed. Sav. Bank, et al. v. Director, OTS*, No. 90-5971 (6th Cir.) (Gov't brief dated August 10, 1990 at 21). Similarly, in another case, the Government argued: "Plaintiff has chosen not to seek an exception from these requirements and, thus, has not given the

self-executing, but required the intervention of the OTS for enforcement.

This Court has recently held that a statutory limitations period is not triggered by knowledge of the fact that liability will occur in the future, no matter how obvious it is that such liability will occur, but instead is triggered only when a contracting party actually acts in violation of the sued-upon obligation. *See Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 118 S. Ct. 542, 549 (1997). In *Bay Area Laundry*, the Court held that the six-year statute of limitations on a cause of action for unpaid withdrawal liability under the Multiemployer Pension Plan Amendments (MPPAA) to the Employment Retirement Income Security Act (ERISA) was not triggered at the time an employer withdrew from the plan, despite the MPPAA's provision for employer withdrawal liability. *See id.* at 544. This Court rejected the Ninth Circuit's reasoning that the statutory period began as of the date of the withdrawal, holding instead that the statutory period began only after a series of regulatory processes resulted in an *actual nonpayment* by the employer. *See id.* at 549. The Court stated that "[u]nder [the statutory] scheme, withdrawal merely sets in motion the . . . process of calculation, notification, schedule, possible request for review or arbitration, and payment." *Id.* at 549 (internal quotations omitted). "Applying the ordinarily applicable accrual rule," *id.* at 546, the Court held that the statutory period was not

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Office of Thrift Supervision an opportunity to render a final decision on the application of FIRREA's capital requirements . . . Plaintiff's alleged damages, therefore, are purely speculative." *Glendale Fed. Bank, FSB v. United States*, No. 90-772C (Ct. Cl.) (Gov't brief dated October 15, 1990 at 3).

triggered until "two events transpire," *id* at 549. First, the trustee "must calculate the debt [and] set a schedule of installments . . . . Second, the employer must default on an installment due and payable under the trustees' schedule." *Id.*

Here, the OTS's regulatory scheme included provision for allowing continued use of supervisory goodwill at least until January 1, 1991. Thus, like the statutory scheme in *Bay Area Laundry*, the OTS regulations allowed the Government to control the timing of the enforcement of statutory requirements. *Cf. id.* at 550-51 ("Congress did not set a fixed time during which a pension fund's trustees must calculate the employer's withdrawal liability, although it surely could have done so.") The Federal Circuit's holding that the statutory limitations period began before the OTS had acted on SoCal's capital plan thus ignores this regulatory framework.

C. Other Circuits Have Recognized That The Government's Stated Intention Not To Honor Its Winstar-Type Agreements Constituted An Anticipatory Repudiation, Not A Breach.

Two other Circuits have determined, in *Winstar*-related cases, that the Government's announced intention to enforce FIRREA's capital requirements against a thrift constituted an anticipatory repudiation, not a breach. *See Far West Fed. Bank v. OTS*, 119 F.3d 1358, 1365 (9th Cir. 1997); *Resolution Trust Corp. v. FSLIC*, 25 F.3d 1493, 1501 (10th Cir. 1994).

The Tenth Circuit recognized that the timing of the Government's breach depended upon (1) the actual imposition of restrictions on the thrift coupled with (2) the denial of the thrift's request for an exception from regulatory

capital requirements. In *Resolution Trust Corp.*, the Tenth Circuit rejected the Government's contention that the OTS's enforcement of the FIRREA regulations would not constitute a breach of contract as a matter of law under the sovereign acts doctrine. The court held that the sovereign acts doctrine did not apply because the OTS may "properly be held in breach of any agreements which *could have been honored by the exercise of discretion afforded them by Congress.*" 25 F.3d at 1501 (emphasis added). The court identified the exception provision of FIRREA, 12 U.S.C. § 1464(t)(8), as the "analytical key" to its holding that the OTS had breached its contract by *refusing* to grant an exception. "Because it was within the Director's discretion to allow continued use of regulatory accounting measures until January 1, 1991, OTS's refusal to abide by the contract's supervisory and regulatory goodwill terms constituted a breach of a contract term." *Id.* The breach occurred when the Government chose not to exercise its discretionary exceptions authority *and affirmatively forced the thrift into compliance with FIRREA, see id.*, not when the thrift was given notice that FIRREA's regulatory requirements would be applied to it.

The Ninth Circuit has also determined, in another *Winstar*-related case, that notice of intent to enforce FIRREA's regulatory regime is a classic anticipatory repudiation that gives the other contracting party the *option* to sue if that party chooses to treat the repudiation as a breach. In *Far West*, decided after *Winstar*, the Government argued that it had not yet breached its contract because the district court had entered an injunction that "shielded [the thrift] from whatever adverse impact it might otherwise have suffered from FIRREA." *Far West*, 119 F.3d at 1365. The Ninth Circuit rejected this argument, holding that the Government's announced intention to impose FIRREA regulations on the thrift was an anticipatory repudiation of the contract. Citing the *Restatement (Second) of Contracts*

§ 253 for the proposition that a repudiation alone gives rise to a claim for total breach even when performance is still possible, the court held that plaintiffs had an "absolute right to cease their own performance and to obtain rescission and restitution." *Id.* The *Far West* court did *not* hold that the Government had breached its contract by notifying the plaintiffs of its intention to apply FIRREA to them. It determined, correctly, that such notification was only an anticipatory repudiation, thus allowing the plaintiff the *option* either to treat the repudiation as an unequivocal breach and file suit immediately or to defer until actual non-performance of the contract, that is, until the thrift was actually adversely affected by FIRREA's regulatory requirements. *See id.*

Both the Ninth and Tenth Circuit decisions are appropriate in light of *Winstar* and well established contract law. There is no support for the Federal Circuit's proposition that the statutory limitations period begins when the Government announces its intention to apply rules that are inconsistent with a contract as opposed to when the regulators actually enforce those rules. In this case, that enforcement did not occur until after April 18, 1990, less than six years before suit was filed.

CONCLUSION

In *Winstar*, this Court held that generally applicable contract doctrine should govern the contract at issue in this case. The Federal Circuit, however, applied a novel and inappropriate rule that makes "notice" the touchstone of contract breach for purposes of the statute of limitations. The Federal Circuit's decision is contrary to settled contract doctrine, FIRREA's regulatory framework, and the reasoning of cases in two other Circuits. As it did in *Winstar*, this Court

should grant the writ of certiorari to ensure that the Federal Circuit—the Circuit where the Government's contract partners are generally obliged to litigate—correctly applies principles of contract law.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 12, 1998

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

97-5050

ARIADNE FINANCIAL SERVICES PTY. LTD.
and MEMVALE PTY. LTD.,
Plaintiffs-Appellants,

v.

THE UNITED STATES,
Defendant-Appellee.

DECIDED: January 6, 1998

Before: LOURIE, RADER, and SCHALL, *Circuit Judges*.

RADER: *Circuit Judge*.

The United States Court of Federal Claims dismissed Ariadne Financial Services's (Ariadne's) breach of contract action as untimely filed. *See Plaintiffs in Winstar-Related Cases v. United States*, 37 Fed. Cl. 174, 191 (1997). Because the trial court correctly determined that Ariadne's claim had accrued more than six years before its filing, this court affirms.

I.

In the 1960s and 1970s, federal regulations placed a cap on the interest a thrift institution could pay on deposits. As long as this maximum rate remained less than the interest rate the thrifts charged on home mortgages, their principal asset, the cap operated to the thrifts' benefit. When interest rates rose in the late 1970s, however, thrifts could not raise

interest rates to attract depositors. The thrifts' share of the investment market began to wane. To alleviate this regulation-induced market imbalance, a 1980 act lifted the cap on the interest thrifts could offer. *See* Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (1980). With the cap removed, thrifts competed for deposits by raising rates. However, the costs of these short term deposits soon outstripped the thrifts' income from long term, fixed rate mortgages. For this reason, among others, thrifts began to fail in large numbers. More than 400 thrifts declared bankruptcy between 1981 and 1983. *See generally* H.R. Rep. No. 101-54, pt. 1, at 296 (1989), *reprinted in* 1989 U.S.C.C.A.N. 86, 92.

The high number of bankruptcies threatened the health of the Federal Savings and Loan Insurance Corporation (FSLIC), which insured consumer deposits at thrifts. The Federal Home Loan Bank Board (FHLBB) – the regulatory agency responsible for overseeing federally chartered thrifts – responded to this impending crisis by encouraging healthy thrifts to purchase insolvent thrifts. To allow these acquisitions to proceed without the acquiring thrifts immediately becoming insolvent, FHLBB and the acquiring thrifts entered into contracts creating a paper asset commonly called "supervisory goodwill." FHLBB accorded this asset value when assessing a thrift's compliance with regulations governing minimum capital requirements. The agreements amortized supervisory goodwill over a fixed number of years. Despite such arrangements, the costs of bailing out insured thrifts continued to mount.

In an effort to control these costs, the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified as amended in various sections of 12 U.S.C.),

abolished FSLIC and FHLBB, transferred thrift insurance activities to the Federal Deposit Insurance Corporation, transferred the assets of failed thrifts to the Resolution Trust Corporation, created a new thrift regulatory agency – the Office of Thrift Supervision (OTS), and made substantial changes in the regulation of the thrift industry. Importantly, FIRREA adopted minimum capital requirements that prohibited the use of supervisory goodwill. *See* 12 U.S.C. §§ 1464(t)(1)-(2) (1994). The statute instructed the director of OTS to promulgate implementing regulations, *see id.*, and provided that the director could grant limited exceptions to the capital standards, *see id.* §§ 1464(t)(6)-(8).

On November 8, 1989, OTS published interim final rules, effective December 7, 1989, implementing FIRREA's capital requirements. *See* Regulatory Capital, 54 Fed. Reg. 46,845 (1989) (codified as amended in various sections of 12 C.F.R.). On January 9, 1990, OTS issued a "Thrift Bulletin" emphasizing that the new regulations applied to thrifts that had been "operating under previously granted capital and accounting forbearances." Office of Thrift Supervision, "Capital Adequacy: Guidance on the Status of Capital and Accounting Forbearances and Capital Instruments Held by a Deposit Insurance Fund." Thrift Bulletin No. 38-2, 1990 WL 309397 at *1 (Jan. 9, 1990).

Without supervisory goodwill as an asset, a number of thrifts that had entered into agreements with FHLBB could no longer comply with the regulatory minimum capital requirements. These thrifts undertook a variety of steps to regain compliance with these requirements. Several thrifts also sued the government for breach of contract. In *United States v. Winstar Corp.*, 518 U.S. 839 (1996), the Supreme Court affirmed decisions of this court and the Court of Federal Claims that determined that FIRREA and its

implementing regulations had caused the government to breach its contracts with healthy thrifts by forbidding the use of supervisory goodwill. The Court then remanded for determination of the damages caused by this breach.

More than one hundred additional claimants have joined the original plaintiffs in *Winstar*. On September 18, 1996, the Court of Federal Claims consolidated these cases for the purpose of certain pretrial proceedings. The government then moved to dismiss twenty-six cases filed after August 9, 1995, for failure to meet the statute of limitations. The government argued that plaintiffs' cause of action accrued on August 9, 1989, the date of enactment of FIRREA. The Court of Federal Claims determined that accrual had occurred on December 7, 1989, the effective date of the FIRREA implementing regulations. *See Winstar-Related Cases*, 37 Fed. Cl. at 184. Accordingly, the Court of Federal Claims denied the government's motion as to twenty-four of the twenty-six plaintiffs. *See id.* Ariadne is one of these two plaintiffs, and now appeals the dismissal of its claim.

II.

On April 30, 1987, Ariadne had entered into a series of transactions in which it provided a total of $36.9 million to purchase the Southern California Savings & Loan (SoCal) from government receivership. Ariadne purchased 89% of the preferred stock in the holding company that purchased the thrift from the government, 89% of the preferred stock in the thrift, and made a loan to the active investors who would be managing SoCal. Ariadne also executed a document, the "Rebuttal of the Rebuttable Determination of Control" (Rebuttal), in which it promised to limit participation in the management of the thrift. As part of the transaction, FHLBB and FSLIC agreed that SoCal could use supervisory goodwill as an asset and amortize it over the next twenty-five years.

Due to FIRREA, SoCal could no longer use supervisory goodwill to meet the regulatory capital requirements. Therefore, SoCal ended 1989 with inadequate capital. On March 2, 1990, SoCal filed an amended capital restoration plan with OTS. The plan contained restrictions on SoCal's business activities designed to bring it into compliance with the FIRREA capital standards. OTS approved this plan on April 18, 1990. In late 1990, OTS notified SoCal that it believed SoCal was not in compliance with the capital restoration plan. After SoCal failed to win approval for a revised capital restoration plan, it engaged in a series of recapitalizations which culminated in the 1995 liquidation of Ariadne's interest in SoCal for $50,000.

Seeking reimbursement for its losses, Ariadne filed a breach of contract action in the Court of Federal Claims on April 16, 1996. Thus, April 16, 1990, became the critical date for this application of the statute of limitations. Ariadne argued that its claim did not accrue until it first suffered damages from the government's breach of contract. *See Terteling v. United States*, 334 F. 2d 250, 254 (Ct. Cl. 1978) ("It is too well established to require citation of authority that a claim does not accrue until the claimant has suffered damages."). Ariadne maintains that the earliest possible date on which its claim could have accrued was April 18, 1990, when OTS first imposed restrictions on SoCal's business activities. The trial court dismissed this claim for failure to file within the six-year statute of limitations in 28 U.S.C. § 2501 (1994).

III.

The relevant statute of limitations provides: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. §

2501. As a threshold matter, this statutory language confirms that the question of a time bar on Ariadne's claim does not affect the subject matter jurisdiction of the Court of Federal Claims. The Court of Federal Claims has subject matter jurisdiction to adjudicate cases arising under the Tucker Act regardless of the timeliness of Ariadne's actions. Ariadne's untimeliness can, however, bar its eligibility to invoke that jurisdiction. *See Borough of Alpine v. United States*, 923 F. 2d 170, 171 n.1 (Fed. Cir. 1991).

In the contract at issue, the government promised SoCal the use of supervisory goodwill in partial satisfaction of its minimum regulatory capital requirement. In essence, the government promised to allow SoCal the use of an asset for twenty-five years. The government made no direct promises concerning the use of supervisory goodwill to Ariadne. Assuming, without deciding, that Ariadne was a party to this contract, *see Resolution Trust Corp. v. Federal Sav. & Loan Ins. Corp.*, 25 F. 3d 1493, 1498-99 (10th Cir. 1994), Ariadne's breach of contract claim accrued when Ariadne should have known that it had been damaged by the government's breach.

In this case, Ariadne suffered damage when the government repudiated the contract before April 16, 1990. The government had promised to let SoCal use an asset for a period of twenty-five years. Approximately four years into the agreement, the government denied SoCal any use of the asset. Due to the restrictions on Ariadne's actions to which it had agreed in the Rebuttal, Ariadne could not control SoCal's response to the loss of the asset. Nevertheless, as the predominant holder of preferred shares in both SoCal and the holding company that owned SoCal, Ariadne also was damaged by the government's breach. Loss of the

supervisory goodwill made SoCal, and Ariadne's investment in SoCal, considerably less valuable.

The Court of Federal Claims determined that Ariadne should have known that it had lost the asset prior to April 16, 1990. This court detects no clear error in that determination. Indeed, SoCal itself was sufficiently certain that it had lost the use of supervisory goodwill that it filed a capital restoration plan on March 2, 1990.

The decision of our sister circuit in *Resolution Trust*, 25 F.3d 1493, does not alter this determination. In that case, the Tenth Circuit discussed OTS discretion in the context of determining that the sovereign acts doctrine did not preclude a breach of contract claim. *See id.* at 1501-02; *accord Winstar*, 518 U.S. at 891 ("The Government's final line of defense is the sovereign acts doctrine . . . . The Government's position cannot prevail . . . ."). Because the Tenth Circuit did not have before it the question of when the breach of contract claim accrued, its decision does not alter this court's view of the trial court's findings and conclusions.

Likewise, the stabilization doctrine does not excuse Ariadne's untimely filing. In *United States v. Dickinson*, the Supreme Court allowed a party to delay filing suit until the frequency of the flooding caused by a newly constructed dam determined whether the taking of the plaintiff's property was permanent or temporary. 331 U.S. 745, 749 (1947). Ariadne would like to invoke this principle to delay accrual of its claim until the extent of its damage from the breach was reasonably certain. The *Dickinson* stabilization principle, however, does not apply outside its context. Later cases have essentially confined the stabilization doctrine to the class of flooding cases from which it originated. *See United States v. Dow*, 357 U.S. 17, 27 (1958) ("The *expressly limited* holding in *Dickinson* was that the statute of limitations did not bar an

action under the Tucker Act for a taking by flooding when it was uncertain at what stage in the flooding operation the land had become appropriated to public use.") (emphasis added); *see also Fallini v. United States*, 56 F.3d 1378, 1381-82 (Fed. Cir. 1995) (collecting cases), *cert. denied*, 517 U.S. 1243 (1996); *Applegate v. United States*, 25 F. 3d 1579 (Fed. Cir. 1994) (applying stabilization doctrine to flooding caused by harbor construction project). Because Ariadne's claim is not of this type, the stabilization doctrine does not apply. *Cf. Cherokee Nation v. United States*, 124 F.3d 1413, 1417 (Fed. Cir. 1997) (explaining that certainty of total damages not required for action to proceed).

Finally, the continuing claims doctrine also does not postpone the accrual of Ariadne's claim. The continuing claims doctrine often operates to save parties who have pled a series of distinct events - each of which gives rise to a separate cause of action - as a single continuing event. In such cases, the continuing claims doctrine operates to save later arising claims even if the statute of limitation has lapsed for earlier events. *See Brown Park Estates-Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1456 (Fed. Cir. 1997); *Friedman v. United States*, 310 F.2d 381, 384-85 (Ct. Cl. 1962). Accordingly, Ariadne would like to press separate claims for damages for each year in which SoCal lost the use of supervisory goodwill. However, the continuing claims doctrine does not apply to a claim based on a single distinct event which has ill effects that continue to accumulate over time. *See Brown Park Estates*, 127 F. 3d at 1457; *Applegate*, 25 F. 3d at 1583; *Hart v. United States*, 910 F. 2d 815, 818 (Fed. Cir. 1990). Here, Ariadne seeks compensation for repudiation of a contract that promised continuing performance into the future. There was a single repudiation by which the government made clear its intent to reject the terms of the contracts. Each subsequent denial of the use of

supervisory goodwill does not give rise to a separate cause of action. Rather, the government's continued refusal to allow the use of supervisory goodwill flows from its original repudiation. Because Ariadne's claim does not involve a series of distinct events, each giving rise to an independent cause of action, the continuing claims doctrine does not act to preserve its claim.

The court has long held that 'a cause of action accrues when all the events have occurred that fix the defendant's alleged liability and entitle the plaintiff to institute an action." *See Fallini*, 56 F. 3d at 1380 (citation omitted). Ariadne asserts a breach of contract claim against the government. The contract between the government and SoCal provided that SoCal could use supervisory goodwill as part of its minimum required capital for a period of twenty-five years. In short, the government agreed to let SoCal use an asset for twenty-five years. The government breached this contract by refusing to permit further use of the asset after only four years. *See Winstar*, 518 U.S. at 870-71.

The government's liability was fixed when it refused to allow use of the asset as it had promised. Before April 16, 1990 – the critical date for this filing – the government had enacted a statutory prohibition on the use of supervisory goodwill and issued regulations enforcing this prohibition. It then issued a notice of intent to apply these regulations to thrifts, including SoCal. The government ordered "[a]ll savings associations presently operating with these forbearances . . .[to] eliminate them in determining whether or not they comply with the new minimum regulatory capital standards." Thrift Bulletin No. 38-2, 1990 WL 309397 at *1.

This court need not determine today precisely which act constituted the government's repudiation of its contract obligations. For the purpose of resolving the present dispute

it is enough to note that SoCal was sufficiently convinced that supervisory goodwill was no longer available to it as an asset by March 2, 1990. On that date, SoCal submitted to OTS a capital restoration plan designed to bring SoCal into compliance with regulatory capital requirements without the supervisory goodwill asset. By that time, Ariadne knew or should have known that SoCal had lost this asset. Ariadne filed suit more than six years after this date. Title 28, section 2501 of the U.S. Code thus bars this particular Tucker Act claim.

IV.

Ariadne's claim accrued more than six years before its filing in the Court of Federal Claims. Neither the stabilization doctrine nor the continuing claims doctrine prevent the action of the statute of limitations in this case. Accordingly, Ariadne's claim is barred by 28 U.S.C. § 2501, and the Court of Federal Claims properly dismissed its complaint.

COSTS

Each party shall bear its own costs.

AFFIRMED.

APPENDIX B

In the United States Court of Federal Claims

Filed: January 7, 1997

Nos. 95-660 C, 95-730 C to 95-732 C, 95-737 C, 95-769 C, 95-773 C, 95-779 C, 95-782 C to 95-784 C, 95-787 C, 95-790 C, 95-792 C to 95-794 C, 95-797 C, 95-799 C to 95-801 C, 95-803 C to 95-805 C, 95-807 C, 96-108 C and 96-202 C.

PLAINTIFFS IN WINSTAR-RELATED CASES,
Plaintiffs,
v.
The UNITED STATES, Defendant.

Contracts: statute of limitations; accrual of claims. – Where Congress abrogated the government's forbearance agreements with savings and loan institutions by enacting the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), plaintiffs' claims for breach of contract did not accrue for statute of limitations purposes until the regulations implementing FIRREA took effect.

Steven S. Rosenthal of Morrison & Foerster L.L.P., Washington, D.C., argued on behalf of all plaintiffs. *Peter K. Rosen* of Weisman & Rosen, Los Angeles, California, presented a supplementary argument on behalf of Leonard Shane, et al. (No. 96-108 C), and *Richard H. Carlson* of Anthony & Carlson, Oakland, California, presented a supplementary argument on behalf of Ariadne Financial Services (No. 96-202 C).

Shalom Brilliant, with whom were *Assistant Attorney General Frank W. Hunger, Director David M. Cohen*, Department of Justice, Washington, D.C., and Thomas Segal, Office of Thrift Supervision, Washington, D.C., for defendant.

OPINION

WIESE, Issue Judge.

Introduction

In *United States v. Winstar Corp.*, --- U.S. ----, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996), the Supreme Court found the Federal Government liable to three savings and loan institutions for breach of contract stemming from Congress's enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA). The Court ruled that the United States had entered into contracts permitting the institutions to use special accounting methods in regard to their acquisition of certain failing savings and loan associations, that the new capital requirements of FIRREA, as applied to the acquiring institutions, breached the terms of these contracts, "and that the Government is therefore liable in damages for breach." *Id.* at ----, 116 S.Ct. at 2440. The case was remanded to this court to determine the appropriate measure and amount of damages.

In this damages phase of the case, the three *Winstar* plaintiffs have been joined by over 120 other claimants who had entered into similar accounting- method agreements with the United States to facilitate their own acquisitions of failing savings and loan institutions ("thrifts"), and who now seek to recover contract damages from the Government under the *Winstar* holding. All *Winstar*-related cases have been made subject to special case-management procedures. *See* Omnibus

Case Management Order, filed September 18, 1996. Pursuant to these procedures, the parties have agreed to the resolution of certain common issues, one of which is a defense grounded on the statute of limitations. *See id.* at 8-9.

The limitations issue arises in consequence of the Government's motion, filed September 9, 1996, to dismiss 26 of the *Winstar*-related cases for allegedly involving actions commenced here after the statute of limitations had run. The key question in resolving this issue is, at what point did plaintiffs' claims for breach of contract against the United States accrue?

Factual Background

At the encouragement of the Federal Government, plaintiffs, at various times in the 1980's, agreed to take over failing savings and loan institutions. These takeovers were designed to prevent the collapse of endangered thrifts and thereby avoid the heavy financial burden that would otherwise befall the Government as the insurer of the thrifts' deposit accounts.[1]

To make the takeovers financially attractive, the Government agreed to allow the acquiring thrifts to utilize special accounting methods involving the concept of "supervisory goodwill"--an accounting measure that refers to the excess of a purchase price over the fair value of all identifiable assets acquired. The Government allowed the acquiring thrifts to count this "excess" amount toward fulfillment of their reserve requirements. This accommodation

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[1] For a more detailed discussion of the development of the savings and loan industry and the events surrounding the acquisitions of the failing thrifts, see *United States v. Winstar Corp*, --- U.S. ----, ---- - ----, 116 S.Ct. 2432, 2440-46, 135 L.Ed.2d 964 (1996).

was essential to the viability of the takeover transactions, since otherwise most of the acquiring thrifts, once saddled with the liabilities of the failing institutions, would themselves become immediately insolvent under the existing federal banking standards. Government regulators also agreed to allow the acquiring thrifts to amortize the goodwill asset over periods of up to forty years, an accounting concession that effectively allowed the thrifts to appear more profitable than they were.[2]

On August 9, 1989, in response to the savings and loan crisis, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), Pub.L. No. 101-73, 103 Stat. 183 (1989) (codified in various sections of 12 U.S.C.), as an attempt to restore public confidence in the thrift industry by strengthening the industry's precarious financial underpinnings. Although FIRREA significantly altered many aspects of the thrift industry's landscape,[3] the provision most relevant to this litigation was the requirement that the new Office of Thrift Supervision (OTS) "prescribe and maintain uniformly applicable capital standards for savings associations." 12 U.S.C.A. § 1464(t)(1)(A) (West

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[2] Although not legally significant to the issue here, a third incentive for the acquiring thrifts was the contribution of cash by the Government as a permanent credit to the thrift's capital. For a discussion of this incentive, as well as the methods involving the utilization of supervisory goodwill, *see id.* at ---- - ----, 116 S.Ct. at 2442-45.

[3] FIRREA's other changes included: the abolishment of the FSLIC; creation of a new thrift deposit insurance fund under the Federal Deposit Insurance Corporation (FDIC); replacement of the Bank Board with the Office of Thrift Supervision (OTS), which was given the responsibility of regulating all federally insured savings associations; and establishment of the Resolution Trust Corporation (RTC) to liquidate certain closed thrifts and their assets. *See id.* at ----, 116 S.Ct. at 2446.

Supp.1996). The substance of these capital standards was provided in the statute itself, including the requirement that a savings association "maintain core capital in an amount not less than 3 percent of the savings association's total assets." § 1464(t)(2)(A). "Core capital," in turn, was defined to exclude "any unidentifiable intangible assets," such as goodwill. § 1464(t)(9)(A). Through a "transition rule," the statute initially allowed thrifts to include the value of supervisory goodwill in satisfaction of up to one-half of the required core capital amount. However, the statute phased out this allowance completely as of January 1, 1995. § 1464(t)(3)(A). FIRREA also defined "qualifying supervisory goodwill" as supervisory goodwill existing on April 12, 1989, amortized on a straightline basis over the shorter of 20 years, or the remaining period for amortization in effect on April 12, 1989. § 1464(t)(9)(B).

FIRREA contained two sets of sanctions for institutions not in compliance with the new capital standards. For noncompliance occurring before 1991, the OTS Director was given discretion to restrict the asset growth of the thrift, and "beginning 60 days from promulgation of final regulations," to require any noncomplying thrift to submit a capital plan for approval by OTS. § 1464(t)(6)(A). For noncompliance occurring during or after 1991, the Director was required to prohibit any asset growth of the thrift (subject to a limited exception), and the thrift, at the same time, was required to comply with any capital enhancement directive issued by the Director. *See* § 1464(t)(6)(B). The Director was given the discretion to permit general exceptions to the new capital standards for a particular thrift. However, no such exceptions were to be effective after January 1, 1991. *See* § 1464(t)(8)(A). Although after that date a thrift could still obtain an exemption from noncompliance sanctions, the thrift

was bound to observe limitations on its asset growth. See §§ 1464(t)(7)(A), (B).

To carry out the new capital standards, FIRREA provided that "[t]he [OTS] Director shall promulgate final regulations under this paragraph not later than 90 days after August 9, 1989, and those regulations shall become effective not later than 120 days after August 9, 1989." § 1464(t)(1)(D). The conference report directed that, "[u]ntil the capital standards required in the Act become effective, the capital regulations promulgated by the Federal Home Loan Bank Board remain in effect." H.R.Conf.Rep. No. 1278, 101st Cong., 1st Sess. 406 (1989). In this connection, in September 1989, OTS instructed thrifts to fill out their quarterly financial reports using whatever accounting methods they had used for the previous quarter's reports--reports filed before FIRREA was enacted. The memorandum accompanying the report forms from OTS stated that "[t]he September 1989 Thrift Report form is the same as the June 1989 Thrift Report form." Plaintiffs' Joint App. at 13.

On November 8, 1989, the Federal Register published an "interim final rule" from OTS setting "uniformly applicable capital regulations for savings associations," as required by FIRREA. 54 Fed.Reg. 46,845 (1989). Dated October 27, 1989, the rule included "requirements for minimum levels of tangible, core, and total capital for all savings associations." *Id.* The effective date of the rule was listed as December 7, 1989. *See id.* OTS appears to have incorporated the new standards in its instructions to thrifts filling out the quarterly financial reports in December 1989, directing that certain fields need not be completed, "[d]ue to the new capital regulation that is in effect beginning December 7, 1989." Plaintiffs' Joint App. at 14.

Ending any uncertainty as to the applicability of the new capital standards, OTS stated on January 9, 1990 that it "is applying the new capital standards to all savings associations, including those associations that have been operating under previously granted capital and accounting forbearances." Office of Thrift Supervision, *Capital Adequacy: Guidance on the Status of Capital and Accounting Forbearances and Capital Instruments Held by a Deposit Insurance Fund*, Thrift Bulletin No. 38-2 (Jan. 9, 1990) (available on Westlaw at 1990 WL 309397) [hereinafter Thrift Bulletin No. 38-2].

As a result of these events, plaintiffs, all of whom had forbearance agreements with the Government stemming from their takeovers of failing thrifts, became subject to OTS-imposed sanctions under FIRREA for failing to meet the minimum capital requirements. Plaintiffs subsequently brought suit against the Government, alleging various combinations of Fifth Amendment takings and breach of contract causes of action, and now seek to recover under the *Winstar* holding. Twenty-six of the plaintiffs filed their complaints on or after September 29, 1995,[4] and that group is now subject to a motion to dismiss by the Government based on the statute of limitations.

Defendant's Motion to Dismiss

Every claim over which this court has jurisdiction "shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C.A. § 2501 (1994). This six-year statute of limitations is "a condition of the government's waiver of sovereign immunity and, as such, must be strictly construed." *Hopland Band of Pomo Indians*

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[4] Twenty-four of these plaintiffs filed between September 29, 1995 and December 7, 1995. The remaining two filed on February 22, 1996 (Shane), and April 16, 1996 (Ariadne Financial Services).

v. United States, 855 F.2d 1573, 1577 (Fed. Cir.1988). Thus, if plaintiffs' claims accrued before September 29, 1989,-- six years before the first suit was filed by this group of plaintiffs--the statute of limitations will have run, and all 26 suits must be dismissed for lack of jurisdiction.

Defendant argues that this, indeed, is the case, by asserting that all *Winstar*-related claims accrued on August 9, 1989,--the date of FIRREA's enactment. Plaintiffs, on the other hand, point to December 7, 1989,--the date OTS's implementing regulations became effective--as the earliest possible time of accrual. Alternatively, plaintiffs would postpone the time of claim accrual until the various occasions in 1990 when OTS enforced FIRREA sanctions against individual thrifts. The determination of the time of accrual will resolve the statute of limitations issue, and with it defendant's motion to dismiss.

Defendant's argument that plaintiffs' claims accrued upon FIRREA's enactment is based on several considerations, including the legislative history and practical import of the statute itself. First, however, defendant refers to the language earlier used by other courts in addressing the more basic question of whether the Government had breached its forbearance agreements with plaintiffs. The Federal Circuit, for example, in addressing the breach issue in Winstar, found that "the [FIRREA] legislation quite specifically abrogates agreements the government had made at an earlier time." 64 F.3d 1531, 1549 (Fed.Cir.1995). Other courts used similar language in finding that FIRREA breached the Government's agreements. *See, e.g., Franklin Federal Savings Bank v. Director, Office of Thrift Supervision*, 927 F.2d 1332, 1341 (6th Cir.) (concluding that "FIRREA abrogates the regulatory forbearance issued to Franklin by the [Board]"), *cert. denied*, 502 U.S. 937, 112 S.Ct. 370, 116 L.Ed.2d 322 (1991).

According to defendant, these cases show that it was the enactment of FIRREA itself that was seen as the alleged breach of contract; hence, defendant contends, it is that event, rather than the subsequent issuance of regulations, that marks the point at which plaintiffs' claims accrued.

Defendant also points to FIRREA's legislative history as an indication that the terms of FIRREA were meant to abrogate the Government's forbearance agreements with plaintiffs. The legislative debates and procedural history surrounding FIRREA led courts to conclude that Congress, by enacting FIRREA, intended to change the capital standards for all thrifts, including those with forbearance agreements. *See, e.g., Ensign Financial Corp. v. FDIC*, 785 F.Supp. 391, 402 (S.D.N.Y.1992) ("We believe that when FIRREA's statutory language is read in light of FIRREA's legislative history, it becomes clear that Congress intended to abrogate the forbearance agreements."). The conclusions other courts have drawn from the language and legislative history of FIRREA lead defendant to assert that "it is beyond serious dispute that Congress abrogated these agreements when it enacted FIRREA."

Finally, defendant argues that FIRREA was not merely an anticipatory repudiation of the Government's forbearance agreements with the thrifts, but, rather, imposed immediate limits upon plaintiffs' use of supervisory goodwill in terms directly contradictory to those set forth in the agreements. Defendant points, for example, to FIRREA's requirement that core capital make up at least 3 percent, and tangible capital 1.5 percent, of a thrift's total assets. *See* §§ 1464(t)(2)(A), (B). Also, under the terms of the statute, thrifts could not include supervisory goodwill in calculating tangible capital, *see* § 1464(t)(9)(C), and could only include it in calculating core capital under a phase-out schedule that would prohibit its

inclusion completely after December 31, 1994.[5] *See* § 1464(t)(3)(A). Thus, defendant would argue, any breach by the Government occurred through the terms of the statute, and was not contingent on any subsequent regulations. "From the day FIRREA was enacted," defendant asserts, "the affected institutions were not free to act in disregard of those restrictions that FIRREA expressly required OTS to include in its regulatory standards." According to defendant then, any breach by the Government occurred upon FIRREA's enactment, regardless of the timing of subsequent regulations, and the statute of limitations therefore began running on August 9, 1989.

For the reasons set forth below, the court disagrees.

Discussion

As both parties recognize, a claim first accrues, within the meaning of section 2501, "when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action," *Oceanic S.S. Co. v. United States*, 165 Ct.Cl. 217, 225, 1964 WL 8621 (1964), and "the plaintiff was or should have been aware of their existence." *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed.Cir.1988). Thus, this court must determine at what point during the enactment and enforcement of FIRREA and its accompanying regulations plaintiffs became entitled to sue the Government for breach of contract.

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[5] Defendant does not limit the immediate effect of FIRREA to its restrictions on supervisory goodwill, noting that the statute's minimum capital standards also circumscribed any right to more lenient standards plaintiffs might claim under the forbearance agreements.

Prior FIRREA Litigation

Contrary to the assertions of defendant, the court does not find much useful guidance for this inquiry in the language of the *Winstar* courts. By selectively quoting excerpts from opinions at each stage of that litigation, defendant attempts to portray those courts as having conclusively established the statute's enactment as the time at which the Government's breach occurred. However, the portion of Justice Souter's plurality opinion in *Winstar* most pertinent to the accrual issue is most notable for its lack of a clear answer:

> When the law as to capital requirements changed in the present instance, the Government was unable to perform its promise and, therefore, became liable for breach. We accept the Federal Circuit's conclusion that the Government breached these contracts when, pursuant to the new regulatory capital requirements imposed by FIRREA ..., the federal regulatory agencies limited the use of supervisory goodwill and capital credits in calculating respondents' net worth.

United States v. Winstar Corp., --- U.S. ----, ---- - ----, 116 S.Ct. 2432, 2452-53, 135 L.Ed.2d 964 (1996). In the first sentence, Justice Souter seems to imply that the breach occurred at the time the law itself changed, while in the second, he portrays the breach as occurring when the regulatory agencies acted. Defendant attempts to explain away this ambiguity by proposing that both the statute's enactment and the agency action breached the forbearance agreements: "If OTS breached the contracts involved in *Winstar* by circumscribing the use of supervisory good will, the fact remains that FIRREA itself also circumscribed the use of supervisory good will...." This argument leads defendant into some dangerous territory, for if it were to convince the court that both events constituted breaches of contract, then

plaintiffs likely could measure accrual from the moment of the most recent breach under the "continuing claim" doctrine. *See, e.g., Cherokee Nation of Oklahoma v. United States*, 26 Cl.Ct. 798, 803 (1992) (noting that "if defendant owes a continuing duty, a new cause of action arises each time the government breaches that duty"). In this case, however, only one breach is apparent.[6] The timing of that breach was irrelevant to the Supreme Court's reasoning--hence the ambiguity in Justice Souter's treatment--and thus was not established conclusively in the *Winstar* litigation.

Defendant's reliance on other cases following in the aftermath of FIRREA is similarly unhelpful in resolving the issue at hand. Defendant accurately points out that several courts have held, based on the statute's language and legislative history, that Congress intended FIRREA to eliminate the Government's forbearance agreements with affected thrifts. Among the cases referred to are: *Far West Federal Bank, S.B. v. Director, Office of Thrift Supervision*, 951 F.2d 1093, 1098 (9th Cir.1991); *Franklin Federal Savings Bank v. Director, Office of Thrift Supervision*, 927 F.2d 1332, 1341 (6th Cir.), *cert. denied*, 502 U.S. 937, 112 S.Ct. 370, 116 L.Ed.2d 322 (1991); *Guaranty Financial Services, Inc. v. Ryan*, 928 F.2d 994, 1006 (11th Cir.1991) and *Ensign Financial Corp. v. FDIC*, 785 F.Supp. 391, 402 (S.D.N.Y.1992). These courts, however, were examining FIRREA's language and history in order to determine whether OTS had the statutory authority to apply FIRREA in a manner that violated the terms of thrifts' forbearance agreements. *See, e.g., Guaranty Financial Services, Inc.*, 928 F.2d at 1006 ("Not only is the OTS's interpretation that FIRREA eliminates

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[6] See the discussion of plaintiffs' argument regarding the continuing claim doctrine, *infra*.

contractual capital and accounting forbearances permissible, the legislative history unambiguously supports that interpretation.") Discerning the congressional intent behind FIRREA may help determine the propriety of subsequent agency action, but it gets us no closer to determining the moment of breach.

In any event, this line of analysis does not necessarily lead to a helpful resolution of the statute of limitations problem. Trying to discern a precise moment of "breach"--i.e., when the Government first acted in a manner inconsistent with the terms of the forbearance agreements--overly widens the scope of inquiry and obfuscates a more relevant question. As noted above, a claim does not accrue, and the statute of limitations does not run, until all of the events necessary to fix the Government's liability have occurred. At what point did those events occur in this case? Because the courts in *Winstar* and other FIRREA-related lawsuits have focused primarily on the existence of a breach, and the statute of limitations was not at issue, their analyses were divorced from this question. To answer the question presented here, the court must turn to the concept of ripeness. Pursuant to this line of inquiry, the timing of the complaints brought by plaintiffs Ariadne Financial Services and Shane necessitate that their arguments be addressed by the court separately from the arguments of those plaintiffs filing before December 8, 1995. The two groups will be addressed in turn.

Plaintiffs Filing Before December 8, 1995

Ripeness:

For a cause of action to accrue and the statute of limitations to run, the claim must be ripe. *See Biddison v. City of Chicago*, 921 F.2d 724, 728-29 (7th Cir.1991);

Massachusetts Bay Transp. Auth. v. United States, 21 Cl.Ct. 252, 261 n. 12 (1990). Common sense, as much as case law, dictates this maxim, for the alternative would lead plaintiffs into a conundrum in which their claims could be time-barred before even becoming amenable to judicial resolution. Defendant correctly points out that "final agency action" is not a prerequisite to plaintiffs' claims becoming ripe. That specific requirement applies to suits brought pursuant to the Administrative Procedure Act (APA), 5 U.S.C.A. § 704 (West 1996), whereas this suit is brought under the Tucker Act, 28 U.S.C.A. § 1491 (West 1994). However, ripeness in general is not a concept whose applicability is limited to the APA. Traditional notions of jurisdiction, while not strictly requiring "final agency action," still demand that a claim be a proper and appropriate subject for judicial resolution. *See Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1403 (9th Cir.1989) (holding that "ripeness is a jurisdictional requirement and lack of subject matter jurisdiction may not be waived"), *cert. denied*, 494 U.S. 1016, 110 S.Ct. 1317, 108 L.Ed.2d 493 (1990). Here, the focal inquiry for this court in addressing the statute of limitations issue is to determine "the time when all events have occurred to fix the Government's alleged liability, entitling the claimant to demand payment and sue here for his money." *Nager Electric Co., Inc. v. United States*, 177 Ct.Cl. 234, 240, 368 F.2d 847 (Ct.Cl.1966). Because plaintiffs obviously were not entitled to bring unripe claims to this court, ripeness is a key component in determining the moment of accrual.

Twenty-four plaintiffs filed suit more than six years after FIRREA's enactment, but less than six years after the OTS regulations took effect. For this group, defendant can win its motion to dismiss only if it convinces the court that plaintiffs' claims became ripe on the day the statute was enacted, thereby

triggering the statute of limitations and barring any claim brought more than six years after that day. To do so, defendant must show that, despite the delayed timing of the implementing regulations and agency enforcement, FIRREA's enactment constituted an actual, not merely anticipatory, breach of plaintiffs' forbearance agreements with the Government.

An anticipatory repudiation "occurs when an obligor communicates to an obligee that the obligor will commit a breach in the future." *Kinsey v. United States*, 852 F.2d 556, 558 (Fed.Cir.1988). If FIRREA's enactment constituted a breach that was solely anticipatory, then plaintiffs' claims did not accrue until some subsequent action by OTS brought about an actual breach. When a party to a contract is faced with an anticipatory repudiation, "[t]he aggrieved party is entitled to sue either when the anticipatory repudiation occurs or at the later time for performance under the contract." Calvin W. Corman, Limitation of Actions § 7.2.1 (1991). So while he may sue, his decision to postpone suit until an actual breach occurs cannot be penalized through the running of the statute of limitations, for his claim has not legally accrued. As courts have recognized, at some point a largely anticipatory breach may be sufficiently "actual" to trigger the statute of limitations: "If, however, the breach is not wholly anticipatory because it involves some contractual nonperformance, the statute of limitations begins to run immediately." *Kinsey*, 852 F.2d at 558. Unless the enactment of FIRREA entailed, in itself, some contractual nonperformance, it was merely an anticipatory repudiation and cannot serve as the trigger point for the statute of limitations.

As plaintiffs point out, FIRREA contained several provisions, not relevant to this litigation, that were apparently

self-executing and did not require implementing regulations. *See, e.g.*, § 1464(u). Under the paragraph setting forth the new capital standards, however, the OTS Director was instructed to "promulgate final regulations" within 90 days, to become effective within 120 days, of FIRREA's enactment. While the substance of these regulations may have added little to the terms of the statute itself, the promulgation of them appears to have been the triggering act for any application of the new capital requirements. *See* H.R.Conf.Rep. No. 222, 101st Cong., 1st Sess. 406 (1989) ("Until the capital standards required in this Act become effective, the capital regulations promulgated by the Federal Home Loan Bank Board remain in effect.") Despite the lag between FIRREA's enactment and issuance of the regulations, defendant argues that FIRREA's repudiation was not merely anticipatory because during that lag, "OTS cannot be said to have allowed what FIRREA required it to disallow," More specifically, defendant explains, "one cannot argue that in the interim OTS permitted the utilization of supervisory goodwill in accordance with the alleged agreements." *Id.* This is, however, precisely what OTS appears to have permitted.

For the fiscal quarter ending September 30, 1989, OTS instructed thrifts to fill out the required Thrift Report form in the same manner as they had for the quarter ending June 30, 1989. Apparently, this meant that thrifts were allowed to include supervisory goodwill in the computation of regulatory capital requirements in September 1989, after FIRREA's enactment, to whatever extent they had been allowed to do so in June 1989, before FIRREA's enactment. It was not until the December 1989 Thrift Report, after the OTS regulations had taken effect, that thrifts were instructed not to complete certain fields on the report due to "the new capital regulation." Plaintiffs' Joint App. at 13, 14. Thus, from the standpoint of statutory construction, FIRREA conditioned the

implementation of its new capital standards on regulations that did not take effect until four months after the statute's enactment. And however dire the effects of FIRREA's terms were to be on thrifts after December 1989, before that date thrifts were effectively told by OTS to adhere to the status quo. Regardless of the fact that OTS was bound to follow FIRREA's terms when it issued its regulations, FIRREA itself merely communicated those terms, and the only means for application stood four months into the future. That those terms constituted an actual breach when applied to the thrifts cannot overshadow the fact that they were not so applied until the regulations took effect. FIRREA was essentially a legally binding forecast of a future breach of the forbearance agreements. Without any accompanying contractual nonperformance, FIRREA falls well within the definition of an anticipatory repudiation.

Defendant raises two basic arguments for why FIRREA's enactment was an actual, not anticipatory, breach. First, defendant details the substantive provisions of FIRREA that limit the use of supervisory goodwill, asserting that "FIRREA itself circumscribed the rights that plaintiffs claim to have acquired pursuant to the agreements in question." Defendant fails to see that the content of FIRREA's terms is irrelevant to the accrual inquiry--what matters is not the substantive terms by which plaintiffs' rights were circumscribed, but the timing of the circumscription itself. Even assuming that FIRREA set forth terms that clearly contradicted the forbearance agreements, if those terms were not implemented until later, the moment of enactment did not constitute an actual breach. Until the actual implementation, there occurred no invasion of a legal right.

Defendant's second argument focuses on the "difference between the performance of specific acts and the process of

coming into compliance with a required financial condition." While Congress can demand immediate compliance when its legislation focuses on specific conduct, the sweeping changes brought about in the new capital standards of FIRREA could only be achieved "over time." Thus, defendant concludes,

> [P]laintiffs may not have been required to be in compliance with FIRREA's capital requirements on the day FIRREA was enacted, but, from that day, plaintiffs had to conduct business in a manner that would bring them into compliance by the effective date of the regulations.

As defendant's argument unintentionally highlights, FIRREA did not legally require plaintiffs to act in any certain way before the effective date of the regulations. Until that time, plaintiffs could legally conduct themselves in accordance with the forbearance agreements, even if the agreements were directly contradicted by the terms of FIRREA. While common sense and business judgment would undoubtedly lead the affected thrifts to prepare to meet the new standards, this does not transform an anticipatory breach into an actual one. Many, if not most, anticipatory breaches lead the opposing party to prepare for an actual breach. But that preparation derives from common sense, not legal obligation, and until the opposing party actually breaches the contract, the cause of action has not accrued. Practically, Congress may not have been able to implement the new standards until thrifts had time to prepare for them; legally, however, until that implementation occurred, FIRREA's breach was anticipatory, plaintiffs' contract claims did not ripen, and the statute of limitations was not triggered. Thus, for the 24 plaintiffs filing suit before December 8, 1996, defendant's motion to dismiss is denied.

Plaintiffs Ariadne Financial Services and Shane

Ripeness:

Postponing accrual until the effective date of the OTS regulations does not dispose of defendant's motion as to two of the plaintiffs, both of whom filed suit more than six years after OTS had both implemented new regulations under FIRREA (December 7, 1989) and advised thrifts that FIRREA eliminated their forbearance agreements (January 9, 1990).[7] To overcome the statute of limitations defense, these plaintiffs must show the court that their claims did not ripen until OTS applied FIRREA's sanctions to their individual thrifts, or until those thrifts pursued the exceptions available under FIRREA.

Although the factual circumstances of their claims differ, both plaintiffs Ariadne Financial Services ("Ariadne") and Shane argue that their claims did not ripen until OTS took direct, individualized action against plaintiffs' respective thrifts. Ariadne argues that until direct action was taken on April 18, 1990, "damage remained a speculative possibility which may or may not have occurred, depending wholly on which, if any, of a variety of discretionary actions was chosen by OTS for implementation." Shane, a shareholder in Mercury Savings & Loan, argues that "until the Government seized Mercury, the enactment of FIRREA merely created the potential that the Mercury shareholders would suffer damages because of the elimination of supervisory goodwill." Their characterizations of FIRREA's impact as "speculative" and "potential" are based, in turn, on OTS's power under FIRREA to grant thrifts limited exceptions to the statute's requirements and sanctions.

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[7] *Shane* (96-108C) was filed on February 22, 1996, and *Ariadne Financial Services* (96-202C) was filed on April 16, 1996.

Despite plaintiffs' claims that they suffered no actual damages until OTS acted against them individually, harm was incurred well before that time. Once the OTS regulations took effect, thrifts were legally subject to new capital standards that were in direct contradiction to the terms of their forbearance agreements. As shown by the instructions accompanying the quarterly Thrift Report form for December 1989, thrifts' reporting requirements changed once the OTS regulations took effect. *See* Plaintiffs' Joint App. at 14. And, as clearly shown by OTS's announcement of January 9, 1990, thrifts with forbearance agreements were no longer allowed to rely on those agreements in the wake of FIRREA. *See* Thrift Bulletin No. 38-2, *supra*. Plaintiffs were left to operate under capital standards governed explicitly and exclusively by FIRREA. They were prohibited from including millions of dollars worth of supervisory goodwill--as their agreements expressly allowed them to do--in their efforts to meet the legally mandated capital standards. As governmentally regulated institutions, failure to meet those standards would place the thrifts' very existence into jeopardy. At this point, the Government's breach of contract was actual, and harm to plaintiffs was inherent and obvious. To argue that actual damages were not inflicted until the Government tracked down individual thrifts and imposed statutory sanctions on them ignores the harm occasioned by implementation of the statutory scheme itself.

If OTS's implementation of FIRREA caused harm to plaintiffs, the question then becomes whether the limited exceptions available under FIRREA prevented plaintiffs' claims from becoming ripe until they had pursued those exceptions. In other words, did the availability of statutory exceptions make plaintiffs' harm sufficiently speculative and hypothetical to justify postponing the accrual of their claims? Plaintiffs claim that before OTS took direct action against

them, "the enactment of FIRREA merely created the potential" that they would suffer damages, and that they were "dwelling in a netherworld period where an exception or exemption, and thus no damage, was continually possible."

FIRREA provided that thrifts could apply to the OTS Director for two important exceptions to the new capital standards.[8] The first was a total exemption from the standards, potentially effective until January 1, 1991. *See* § 1464(8)(A). Under the second, a thrift not in compliance with the new standards could avoid various OTS sanctions, including possible restrictions on payment dividends and compensation, although restrictions on asset growth would still be imposed. *See* § 1464(7)(A), (B). Thus, one exception was temporary in duration, and the other partial in coverage. There was never any chance that thrifts could avoid FIRREA's capital standards completely; it was only a question of whether or not they could gain a temporary exemption from the standards, or escape certain sanctions. Especially after January 9, 1990, when Thrift Bulletin 38-2 announced that OTS would apply FIRREA to thrifts with forbearance agreements, plaintiffs knew that they were subject to the new capital standards. OTS had authority to delay compliance or withhold certain sanctions, but a blanket exemption of a thrift from FIRREA's impact was not within OTS's statutory authority.

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[8] A third exception was available, under which the OTS Director was given discretion to establish minimum capital levels for thrifts on a case- by-case basis. *See* § 1464(s)(2). However, the Director could only do so in a manner consistent with provisions setting forth the new capital standards and the sanctions for failing to comply with them. *See id.* Thus, the exception has little, if any, bearing on a thrift's ability to escape the impact of FIRREA's new standards.

Even if granting a total exemption from FIRREA were within the authority of OTS, it is doubtful that its availability would have been sufficient to postpone the accrual of plaintiffs' claims. As noted above, plaintiffs suffered harm at the moment they were made subject to FIRREA's more stringent capital requirements. The possibility of future exceptions does not negate the harm inherent in the Government's breach. Contrary to plaintiffs' assertions, it was the possibility of the exceptions, not the harm inflicted by FIRREA, that was hypothetical and speculative. The fact that a subsequent grant of exceptions by OTS might have affected the degree or timing of harm inflicted on plaintiffs does not change the accrual analysis. An exception might be relevant to the mitigation of damages, but does not neutralize the harm that was incurred from the moment of FIRREA's implementation. The extent of harm does not need to be fully or precisely known for a cause of action to accrue:

> Because a cause of action subsists when the right exists to demand compensation for injury done to person or property, no matter how slight that injury, it is reasoned that the suit can be instituted at once even though the full amount of damages is not yet apparent.

Calvin W. Corman, Limitation of Actions § 6.1 (1991); *see also State of Alaska v. United States*, 32 Fed.Cl. 689, 700 (1995) ("[T]he statutory period begins to run when a claimant has suffered a compensable injury, not when he is finally able to calculate the precise quantum of his damages."). The future availability of limited exceptions under FIRREA cannot overshadow the present, unavoidable impact which the statute exerted on all thrifts with forbearance agreements, plaintiffs included.

Plaintiffs look to *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), as support for the argument that their claims did not ripen until they pursued FIRREA's available exceptions with OTS. In *Williamson County*, the Supreme Court addressed ripeness requirements in a regulatory takings context. In that case, the plaintiff argued that county zoning regulations had deprived it of its property under the Fifth Amendment. The Court did not reach the merits of the claim, ruling that it had been brought prematurely. The Court held that:

> [A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.

Id. at 186, 105 S.Ct. at 3116. The plaintiff had submitted a plan for developing its property to the zoning commission, which raised eight objections to the plan in finding that it was not in compliance with the zoning ordinance. The Court ruled that the claim was not ripe because the plaintiff failed, after the plan's rejection, to apply for variances from the ordinance, even though variances could only have been granted to five of the board's eight objections. *See id.* at 187-88, 105 S.Ct. at 3117.

Plaintiffs would argue that under *Williamson County*, the fact that they could not have totally avoided FIRREA's impact by applying for the exceptions does not eliminate the need to pursue them before bringing their cause of action. As the Supreme Court ruled with respect to zoning variances, a court would require plaintiffs to pursue any exceptions available under the regulatory scheme before their claim would be

considered ripe. The OTS implementation of FIRREA would thus not have triggered the statute of limitations until plaintiffs had applied for both relevant exceptions, and the OTS had decided whether or not to grant them.

The fatal flaw in plaintiffs' analogy to *Williamson County* is its failure to acknowledge the crucial distinction between a claim for a Fifth Amendment taking and a claim for breach of contract. Under the Fifth Amendment, a person's right to use his property is limited in the face of Government action, and not all levels of Government interference or encroachment constitute a "taking." Whether or not a claimant has the right to compensation depends, in part, on the extent of damages to the claimant's property. "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922). Hence, the judicial inquiry in a takings case properly focuses on the degree of harm, i.e. the extent to which the use of private property has been impaired by Government action. By contrast, a party to a valid contract has an absolute right not to have that contract violated. Thus, a claim for breach of contract hinges simply on whether or not an offending party unjustifiably withheld performance owed pursuant to a legally binding contract. Degree of harm has no place in the inquiry, unless calculation of damages becomes necessary.

In *Williamson County*, therefore, it made perfect sense for the Court to require the plaintiff to pursue available zoning variances before bringing its takings claim. Because determining the degree of harm to the plaintiff's property was crucial to the takings inquiry, a court's resolution of that claim could very well depend on whether or not certain variances were granted. The fact that the variances could

mitigate the harm to the property is essential to the takings inquiry; the fact that they could not negate the harm in its entirety is irrelevant. The same logic does not hold, however, for plaintiffs' breach of contract claims. The fact that plaintiffs might have been able to mitigate their damages by pursuing FIRREA's exceptions is irrelevant to the breach of contract inquiry. The existence of the breach itself, not the degree of harm caused by the breach, is the essential component of plaintiffs' claims. Because the exceptions could not negate the initial harm of the breach itself, plaintiffs' claims were ripe regardless of whether they pursued FIRREA's exceptions.[9]

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[9] Because plaintiffs' complaints alleged that FIRREA constituted a taking under the Fifth Amendment, in addition to a breach of contract, they might understandably seek to raise those claims now to gain the benefit of the *Williamson County* analysis. However, because the *Winstar* ruling, which plaintiffs invoke as the basis for the Government's liability, was based on a finding by the Supreme Court that a valid contract existed between the Government and the thrifts, *see United States v. Winstar Corp.*, --- U.S. ----, ----, 116 S.Ct. 2432, 2440, 135 L.Ed.2d 964 (1996), plaintiffs are conceptually foreclosed from shifting the ground of analysis to the takings context. As a rule, a contract implicitly contains a promise to pay damages in the event of a breach. The Fifth Amendment, by contrast, provides a remedy under circumstances in which no other remedy is available, and thus does not address plaintiffs' injury, which is redressable in contract. "The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other." *Horowitz v. United States*, 267 U.S. 458, 461, 45 S.Ct. 344, 344, 69 L.Ed. 736 (1925) (quoting *Jones v. United States*, 1 Ct.Cl. 383, 384, 1865 WL 1976 (1865)).

Stabilization Doctrine[10]

The stabilization doctrine was first enunciated in *United States v. Dickinson*, 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789 (1947). In that case, the plaintiff brought a takings claim after his land had been flooded. If accrual had been measured from the moment his land became partially submerged, the claim would have been barred by the statute of limitations. However, the Court rejected this approach, ruling that it was natural for a flood victim "to postpone bringing a suit against the Government for the flooding until the consequences of inundation have so manifested themselves that a final account may be struck." *Id.* at 749, 67 S.Ct. at 1385. Because the "source of the entire claim"--the flooding of the plaintiff's land--was not a "single event," but was "continuous," the plaintiff was allowed to postpone suit until the situation became "stabilized." *Id.*

Recently, *Dickinson*'s reasoning has been applied in a contract context. In *Anaheim Gardens v. United States*, 33 Fed.Cl. 773, 776 (1995), developers of low-income housing brought a breach of contract claim against the Government stemming from the passage of legislation that prohibited the prepayment of mortgages. The developers had obtained federally insured mortgages, under which they were allowed, after 20 years, to prepay in full, even without the Government's permission. In return, the developers had agreed to abide by affordability restrictions imposed by the Government. A "temporary measure" passed by Congress imposed a moratorium on prepaying mortgages without the

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[10] Because 24 of the plaintiffs have avoided dismissal on the ground that FIRREA's enactment constituted merely an anticipatory repudiation, plaintiffs' remaining arguments need only be applied to the claims of plaintiffs Ariadne and Shane.

Government's consent, and two years later a second statute, functioning as a "permanent solution," reenacted the moratorium. *Id.* at 776. The developers initially brought only a takings claim, but then sought to add a breach of contract claim even though, if accrual were measured from the enactment of the first statute, their contract claim would be barred by the statute of limitations.

The court rejected this approach for two reasons, both relating to the stabilization doctrine. The court ruled that the plaintiffs' claims could not have accrued until the second statute's enactment. "[P]laintiffs would not have been unreasonable to have forborne litigation until after they had learned what sort of 'permanent solution' Congress would devise." *Id.* at 776. The court also ruled that the claims could not have accrued until plaintiffs' prepayment rights were ripe--that is, until the 20-year period prescribed by the mortgages had expired. Before this time, "[a] plaintiff could not be expected to have been able to make even a rough estimate of its contract damage." *Id.* at 777. The court recognized that *Dickinson* concerned property rights under the Fifth Amendment, but reasoned that its application to the contract claim was "justified in the present case because the prepayment rights which plaintiffs wish to assert are inextricably linked to the property rights which plaintiffs have otherwise asserted in their taking claim." *Id.*

Both plaintiffs Ariadne and Shane invoke *Anaheim Gardens* in their attempts to postpone accrual of their claims until OTS took direct action against them. Shane phrases the argument this way: "As this court held in *Anaheim Gardens*, ... the fact that newly enacted legislation might adversely affect a claimant cannot constitute actual damages under § 2501." Similarly, Ariadne wrote: "In effect, *Anaheim Gardens* recognizes that a cause of action cannot accrue in the

presence of merely speculative damages, a situation directly analogous to that faced by Ariadne on enactment of FIRREA." However, while *Anaheim Gardens* may appear supportive of plaintiffs' argument to the extent that the court applied the stabilization doctrine to a breach of contract claim, two fundamental distinctions preclude its extension to the facts of this case.

First, the plaintiffs' claims did not accrue upon enactment of the first statute in *Anaheim Gardens* only because that legislation was passed as a "temporary solution." The court viewed the first statute merely as an anticipatory repudiation because Congress could have withdrawn the moratorium when it enacted the permanent legislation. *See id.* Thus, as a settled matter of law, discussed *supra*, accrual would not occur until the second statute's enactment made the breach actual.[11]

Second, even under the reasoning of *Anaheim Gardens*, the claims of plaintiffs Ariadne and Shane were sufficiently definite to have accrued before OTS acted directly against them. The court in *Anaheim Gardens* nowhere suggests that those plaintiffs needed to wait for the enforcing agency to deny them their prepayment rights individually before their breach claims could be considered ripe. Rather, the court reasoned that accrual upon the first statute's enactment was premature because the plaintiffs had no way of knowing what Congress's "permanent solution" would be, *id.* at 776, and

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[11] In addressing whether plaintiffs' contract claims were barred by the statute of limitations, the court in *Anaheim Gardens* needed only to decide whether accrual occurred upon the enactment of the first statute, or at some point thereafter. Thus, the court did not address the primary question facing this court: whether accrual of the plaintiffs' claims would occur upon enactment of the statute, or at the effective date of the enforcing agency's implementing regulations.

many of the plaintiffs could not yet even exercise their prepayment rights under the mortgage agreements. *See id.* at 777. In short, there was neither a present injury nor any certainty of a future injury.

In this case, plaintiffs Ariadne and Shane stood in a much different position in evaluating their own causes of action, given that they faced: a "permanent" statute, FIRREA, that explicitly stated that the accounting value of supervisory goodwill would be wiped out, *see* § 1464(3)(A); regulations promulgated by OTS explaining how the agency would implement the statute, *see* 54 Fed.Reg. 46,845 (1989); and a bulletin from the agency expressly stating its intention to apply the statute to plaintiffs with forbearance agreements. *See* Thrift Bulletin No. 38-2, *supra*. And as noted above, the potential future grant of a partial exception to FIRREA's sanctions cannot be allowed to overshadow the certainty and immediacy of the impact which the statute and regulations had on plaintiffs. The stabilization doctrine was not created to be applied to every situation in which damages have not yet been written in stone. Rather, it is limited to those cases in which a plaintiff could not rightfully be expected to bring suit until the process giving rise to a claim--be it flooding, as in *Dickinson*, or incrementally enacted legislation, as in *Anaheim Gardens*--reached completion. Contrary to plaintiffs' argument, the fact that direct, individualized agency enforcement has not yet occurred does not mean that a claim has not "stabilized" for accrual purposes.

Continuing Claim Doctrine

Under the continuing claim doctrine, "if defendant owes a continuing duty, a new cause of action arises each time the government breaches that duty." *Cherokee Nation of Oklahoma v. United States*, 26 Cl.Ct. 798, 803 (1992). If one of those breaches falls within the period prescribed by the

statute of limitations, the doctrine "permits a plaintiff to defer litigious action until the termination of [the] continuing wrong, and thus spares plaintiff from having to pursue multiple actions." *Id.* Plaintiffs Ariadne and Shane argue that their causes of action constitute continuing claims, thus postponing accrual until after the final breach of the Government's continuing duty--when OTS acted directly against their thrifts. Their argument, however, misconstrues the nature of their own causes of action in light of relevant caselaw.

When a court has applied the continuing claim doctrine in the past, the case has always involved a series of distinct events, each causing harm to the plaintiff and each classifiable as a separate "breach" of the defendant's "continuing duty" to the plaintiff. *See, e.g., Applegate v. United States*, 25 F.3d 1579, 1584 (Fed.Cir.1994) (rejecting application of continuing claim doctrine because the case "does not involve a string of distinct events"); *Burich v. United States*, 177 Ct.Cl. 139, 366 F.2d 984, 986 (Ct.Cl.1966) ("This court has long adhered to the view that a suit for compensation due and payable periodically is, by its very nature, a 'continuing claim' which involved multiple causes of action, each arising at the time the Government fails to make the payment alleged to be due."), *cert. denied*, 389 U.S. 885, 88 S.Ct. 152, 19 L.Ed.2d 182 (1967). The cases which plaintiffs look to for support fall squarely within this paradigm.

In *Massachusetts Bay Transp. Auth. v. United States*, 21 Cl.Ct. 252 (1990), the plaintiff brought a variety of claims against the Government stemming from the performance of a construction contract. The court granted the Government's motion to dismiss for lack of subject matter jurisdiction as to aspects of several claims that were not yet ripe. Although the court did not address the continuing claim doctrine explicitly,

it did note that the plaintiff could have waited to file suit until all of its claims were ripe without losing its earlier accruing claims to a statute of limitations defense. *See id.* at 261 n. 12. Instead of resorting to "piecemeal litigation," the court implied that plaintiff could have brought all of the claims at once, regardless of how much earlier some of them had accrued, as long as they all arose from the relevant transaction with the Government. *Id.* As established above, the claims of plaintiffs Ariadne and Shane had ripened at the time the OTS implementing regulations took effect. A court could have heard their causes of action once the Government's breach became actual, and thus there was no need to postpone suit or to adopt the approach reflected in *Massachusetts Bay*.

The reasoning of *Cherokee Nation of Oklahoma v. United States*, 26 Cl.Ct. 798 (1992), is similarly unhelpful to plaintiffs' argument. In *Cherokee Nation*, an Indian tribe sued the Government for trespass, claiming ownership of certain riverbed lands. The Government moved for dismissal, arguing that the alleged wrongs had first accrued at least 79 years beyond the limitations period. In applying the continuing claim doctrine, the court explicitly set forth the only view of the facts that could have led it to adopt that approach:

> The court has consistently treated each alleged trespass in the instant case *as its own individual wrong*. Therefore, all events that fix the government's alleged liability are not in existence for each new trespass until such trespass actually occurs, and plaintiff knew or should have known of the existence of such trespass.

Id. at 803 n. 4 (emphasis added). Because some of the trespass claims thereby accrued within the statute of limitations period, the plaintiff was given the opportunity to

revive the potential trespass claims that would have accrued beyond the period. *See id.* at 803.

In sharp contrast with *Cherokee Nation* and other cases in which the continuing claim doctrine has been applied by the courts, plaintiffs Ariadne and Shane did not face a series of breaches by the Government. Although more than one single event has made up the factual timeline at the center of this court's inquiry, the relevance of those several events is limited to establishing the timing of the accrual of plaintiffs' claims. There has never been any suggestion that those events, whatever their number, constituted more than one single breach by the Government, regardless of its timing. When OTS denied plaintiffs' individual attempts to include supervisory goodwill in meeting capital requirements, such denial did not give rise to a separate cause of action for breach. Rather, OTS was simply enforcing the breach that arose upon the enactment of FIRREA and its implementing regulations. Once that breach occurred, the Government became liable for any reasonably foreseeable damages suffered by plaintiffs as a result.[12] However, the Government

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[12] In its brief, plaintiff Ariadne expressed concern that, if it had been forced to bring suit earlier, the concept of *res judicata* would have precluded them from recovering subsequently incurred damages. (Ariadne Brief at 10) This is correct, as it is in most litigation contexts. The plaintiff has the burden of forecasting damages that likely will be incurred, and there was nothing to prevent plaintiffs from doing so here. Plaintiffs knew that, without being able to rely on their forbearance agreements (as OTS assured them they would not, in Thrift Bulletin No. 38- 2), they would be forced to adhere to the new capital requirements as outlined in FIRREA and the OTS regulations. The possibility of statutory exceptions would only have been relevant as a potential mitigating factor, to be established by the Government. Under such circumstances, the damages estimation process would be no more difficult or speculative in this context than it is in countless lawsuits in which the specter of *res judicata* similarly looms over a party seeking a monetary recovery.

did not subject itself to facing, into perpetuity, a new cause of action every time an act was performed pursuant to the statutory scheme that gave rise to the breach in the first place.

Judicial Estoppel

Plaintiffs argue that, "[b]ecause there can be no legitimate dispute that the Government's position here is completely inconsistent with its prior position or that this about-face was knowingly undertaken," defendant should be judicially estopped from arguing that plaintiffs' claims ripened upon the enactment of FIRREA. As plaintiffs acknowledge, however, neither this court nor the Federal Circuit has yet applied the doctrine of judicial estoppel to bar the Government from arguing inconsistent positions in regard to identical issues arising in separate actions. *See National Medical Enterprises, Inc. v. United States*, 28 Fed.Cl. 540, 546 n. 2 (1993).

Judicial estoppel "protects the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding." *Id.* (quoting *Reynolds v. Commissioner of Internal Revenue*, 861 F.2d 469, 472 (6th Cir.1988). Defendant correctly points out that success in arguing the prior position by a party is a "critical prerequisite" to invoking the doctrine of judicial estoppel against that party, and cites several cases in full support of that proposition. *See, inter alia, Data General Corporation v. Johnson*, 78 F.3d 1556, 1564 (Fed.Cir.1996); *Water Technologies Corporation v. Calco, Ltd.*, 850 F.2d 660, 665 (Fed.Cir.), *cert. denied*, 191 U.S. 968, 109 S.Ct. 498, 102 L.Ed.2d 534 (1988).

Plaintiffs have found only one case in which defendant's previous position-- that a thrift's claim was not ripe, even after the OTS regulations and Thrift Bulletin No. 38-2 were

issued--was adopted by the court. *See Flagship Federal Savings Bank v. Wall*, 748 F.Supp. 742 (S.D.Cal.1990). However, in that case, the thrift brought a claim for injunctive relief in a district court against administrative agencies, which required a "formal agency action" to be taken before the court could review the claim. *See id.* at 747. As noted above,[13] such agency action is not a prerequisite to review of claims brought in this court pursuant to the Tucker Act. Thus, the Government's position in *Flagship Federal* is not necessarily inconsistent with its position here, and in any case is not relevant to the inquiry in this case. Without a showing by plaintiffs of more compelling circumstances, the general applicability of judicial estoppel to the Government's litigation practice in this court is not an issue that presents itself on these facts. And even assuming that estoppel could be applied by this court to determine a jurisdictional issue,[14] plaintiffs would not be entitled to that remedy in this case.

Conclusion

Because the capital standards prescribed under FIRREA were not enforced until the OTS implementing regulations took effect, plaintiffs' cause of action did not accrue until that time. As such, defendant's motion to dismiss based on the statute of limitations is denied as to the 24 thrifts who filed suit in this court on or before December 7, 1995, but is granted as to plaintiffs Ariadne Financial Services and Shane.

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[13] See the court's discussion of plaintiff's ripeness argument, *supra*.

[14] Defendant contends that judicial estoppel cannot be applied by this court to determine jurisdictional issues.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

97-5050

ARIADNE FINANCIAL SERVICES PTY. LTD.
and MEMVALE PTY. LTD.,
Plaintiffs-Appellants,

v.

THE UNITED STATES,
Defendant-Appellee.

FILED: Mar 17, 1998

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANTS and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on March 24, 1998.

FOR THE COURT,
JAN HORBALY, CLERK

By /s/ Alex Van Veen
Alex Van Veen
Staff Law Clerk

Dated: March 17, 1998

Supreme Court, U.S.
FILED
AUG 14 1998
OFFICE OF THE CLERK

No. 97-2016

In the Supreme Court of the United States

OCTOBER TERM, 1997

ARIADNE FINANCIAL SERVICES PTY. LTD. AND MEMVALE PTY. LTD., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners knew or should have known that they had been damaged by the government's alleged breach of contract more than six years before they filed their claim, thus placing this action outside the limitations period in 28 U.S.C. 2501.

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In the Supreme Court of the United States

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ARIADNE FINANCIAL SERVICES PTY. LTD. AND MEMVALE PTY. LTD., PETITIONERS

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 133 F.3d 874. The opinion and order of the Court of Federal Claims (Pet. App. 11a-44a) is reported at 37 Fed. Cl. 174.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1998. A petition for rehearing was denied on March 17, 1998. Pet App. 45a-46a. The petition for a writ of certiorari was filed on June 12, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case is one of the more than 100 suits that have been filed in the Court of Federal Claims (CFC) since 1991 in which thrift institutions, their shareholders, and their holding companies have alleged breaches of contract by the government as a result of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183. In each case, the plaintiffs have alleged that, during the 1980s and prior to FIRREA, the government agreed to relax certain regulatory capital requirements—particularly by permitting "supervisory goodwill" to be counted as an asset in computing capital—in order to encourage the acquisition of various failing savings and loan institutions. Plaintiffs in each case have alleged that the imposition of FIRREA's new capital requirements—which precluded the use of supervisory goodwill to satisfy regulatory capital requirements—breached those agreements. In *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996), this Court addressed the first three of the "goodwill" cases. In each case, the Court found no cause to question the lower courts' determination that there were enforceable contracts between the government and the thrift institutions, and that the government was liable for breach.

2. FIRREA was enacted on August 9, 1989. As indicated above, it adopted minimum capital requirements that prohibited the use of supervisory goodwill to satisfy regulatory capital requirements. See 12 U.S.C. 1464(t)(1)-(2). The Act instructed the Director of the newly created Office of Thrift Supervision (OTS) to promulgate regulations, *ibid.*, and provided that he could grant limited exceptions to the capital standards required by the Act. 12 U.S.C. 1464(t)(6)-(8).

On November 8, 1989, OTS published interim final regulations, effective December 7, 1989, implementing FIRREA's capital requirements. See 54 Fed. Reg. 46,845 (to be codified at 12 C.F.R. pts. 51, 563, 567). In addition, on January 9, 1990, OTS issued a "Thrift Bulletin" emphasizing that the new regulations applied to thrifts that had been "operating under previously granted capital and accounting forbearances." OTS Thrift Bulletin No. 38-2, *Capital Adequacy: Guidance on the Status of Capital and Accounting Forbearances and Capital Instruments Held by a Deposit Insurance Fund.* (Jan. 9, 1990).

3. In April 1987, petitioners entered into a series of transactions through which they purchased the Southern California Savings & Loan (SoCal) from government receivership. Pet. App. 4a. Petitioners alleged that they had a contractual relationship with the government at the time of the purchase that encouraged the conversion of SoCal from mutual to stock form and petitioners' acquisition of stock resulting from the conversion. Petitioners contended that the government agreed to permit treatment of supervisory goodwill and "capital credits"[1] as capital assets in computing regulatory capital, with supervisory goodwill to be amortized over 25 years. Pet. App. 4a.

4. Petitioners commenced this action on April 16, 1996. On September 9, 1996, the government filed motions in the CFC to dismiss this and 25 other *Winstar*-related cases, on the ground that they were barred by the six-year statute of limitations in 28 U.S.C. 2501, because they accrued on the date FIRREA was enacted (August 9,

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[1] Capital credits are cash assistance provided by the Federal Savings and Loan Insurance Corporation (FSLIC) to facilitate a transaction.

1989) and were filed more than six years after that date. The government further argued that, even if the claims were deemed to have first accrued only when FIRREA's implementing regulations became effective—December 7, 1989—this case and one other (*Shane v. United States*, No. 96-108C)—would still be time-barred. The CFC rejected the former argument, but adopted the latter.

The CFC held that "a claim first accrues, within the meaning of section 2501, 'when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action,' and 'the plaintiff was or should have been aware of their existence.'" Pet. App. 20a. The CFC rejected the government's argument that the claims accrued when FIRREA was enacted, reasoning that such "enactment constituted a breach that was solely anticipatory." *Id.* at 25a. The CFC held that the paragraph of FIRREA setting forth new capital standards was not self-executing, but depended upon instructions to the OTS Director to promulgate final regulations within 90 days, to become effective within 120 days of FIRREA's enactment. *Id.* at 26a. The CFC concluded that "FIRREA was essentially a legally binding forecast of a future breach of the forbearance agreements," and that there was no effective breach until the regulations required by the statute and issued by the OTS Director became effective. *Id.* at 27a. Thus, the CFC declined to dismiss the suits of 24 savings and loans institutions that were filed less than 6 years after the OTS regulations became effective. *Id.* at 28a.

At the same time, the CFC rejected petitioners' argument that no breach occurred until OTS acted against them individually. Rather, it held that the claims accrued when FIRREA's implementing regulations became effective because "[o]nce the OTS regulations took effect, thrifts were legally subject to new capital standards that

were in direct contradiction to the terms of their forbearance agreements." Pet. App. 30a. The CFC also rejected petitioners' argument that their claims did not ripen until they pursued the exceptions available under FIRREA. *Id.* at 33a-34a. The CFC noted that the potential availability to petitioners of mitigation of their damages through FIRREA's exceptions did not change the effective date of the breach of the contract. "The existence of the breach itself, not the degree of harm caused by the breach, is the essential component of [petitioners'] claims. Because the exceptions could not negate the initial harm of the breach itself, [petitioners'] claims were ripe regardless of whether they pursued FIRREA's exceptions." *Id.* at 35a (footnote omitted). Accordingly, the CFC dismissed petitioners' case and the *Shane* case, both of which were filed more than six years after the effective date of the OTS regulations.[2] *Id.* at 44a.

5. The court of appeals affirmed the dismissal of petitioners' case.[3] The court concluded that the CFC did not err in determining that petitioners should have known that they had lost the asset of supervisory goodwill prior to April 16, 1990, and that therefore their claim accrued

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[2] The CFC also rejected three other arguments that petitioners made in support of their contention that their claims did not accrue until individualized agency action was taken against them. See Pet. App. 36a-44a. Those three arguments were: (1) their claims had not "stabilized" until individualized agency action was taken, see *United States* v. *Dickinson*, 331 U.S. 745 (1947); (2) their causes of action constitute continuing claims and postponed accrual until the final breach of the government's continuing duty—when OTS acted directly against them; and (3) the government should be judicially estopped from making its arguments because they were inconsistent with previous positions taken by the government in other litigation.

[3] The appeal in *Shane* is still pending. *Shane* v. *United States*, 37 Fed. Cl. 174 (Fed. Cl. 1997), *appeal docketed*, No. 97-5056 (Fed. Cir. Mar. 17, 1997).

prior to that date—the cut-off date under the statute of limitations. See Pet. App. 6a-7a. The court held that "[t]he government's liability was fixed when it refused to allow the use of the asset [i.e., supervisory goodwill] as it had promised." *Id.* at 9a. The court noted that before April 16, 1990, the statutory prohibition against use of supervisory goodwill had been enacted and OTS had issued regulations enforcing that prohibition. *Ibid.* Moreover, before the critical April 16, 1990, date, OTS had ordered "'[a]ll savings associations presently operating with these forbearances * * * [to] eliminate them in determining whether or not they comply with the new minimum regulatory capital standards.'" Pet. App. 9a.

The court of appeals found it unnecessary to determine "precisely which act constituted the government's repudiation of its contract obligations." Pet. App. 9a. It was sufficient for the court to determine that SoCal was so "convinced that supervisory goodwill was no longer available to it as an asset by March 2, 1990," that it submitted a capital restoration plan to OTS on that date to attempt to come into compliance with regulatory capital requirements without the supervisory goodwill asset. *Id.* at 10a. Thus, by March 2, 1990, at the latest, petitioners "knew or should have known that SoCal had lost [its] asset." *Ibid.* Since petitioners filed suit more that six years after that date, their suit was barred by the statute of limitations.[4] *Ibid.*

ARGUMENT

The fact-bound decision of the court of appeals is correct and does not conflict with any decision of this

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[4] The court of appeals—like the CFC, see note 2, *supra*—rejected petitioners' arguments based on the stabilization and continuing claims doctrines. See Pet. App. 7a-8a. Petitioners do not renew those arguments in this Court.

Court or any other court of appeals. Further review is not warranted.

1. Petitioners misconceive the court of appeals' decision. They contend (Pet. 8-9) that the Federal Circuit erred by holding that the period of limitations commenced when they were on notice that the government *intended* to breach the alleged goodwill agreement. In fact, however, the court of appeals repeatedly stated that the period of limitations began no later than the date on which petitioners knew or should have known that the alleged breach had *already occurred* and had *already resulted in a deprivation* of rights conferred by the alleged agreement.

Stating the rule governing this case, the court of appeals held that petitioners' "breach of contract claim accrued when [they] should have known that [they] *had been damaged by the government's breach*." Pet. App. 6a (emphasis added). The court concluded that the CFC had not erred in determining that petitioners "should have known that [they] had lost the asset prior to April 16, 1990." *Id.* at 7a. The court of appeals reasoned that "[t]he government's liability was fixed when it refused to allow use of the asset as it had promised." *Id.* at 9a. The court determined that that refusal was clear before the critical date of April 16, 1990, because prior to that date the government had enacted a statutory prohibition on the use of supervisory goodwill, had issued regulations enforcing that prohibition, and had "issued a notice of intent to apply these regulations to thrifts, including SoCal." *Ibid.*

The court of appeals stated that it "need not determine today precisely which act constituted the government's repudiation of its contract obligations," Pet. App. 9a, because it was clear that by March 2, 1990, SoCal was sufficiently convinced that supervisory goodwill was no

longer available that it "submitted to OTS a capital restoration plan designed to bring [it] into compliance with regulatory capital requirements without the supervisory goodwill asset." *Id.* at 10a. Thus, the court of appeals concluded that by that time, petitioners "knew or should have known that SoCal *had lost this asset*," *ibid.* (emphasis added), and, hence, the statute of limitations period had commenced. *Ibid.*

2. The court of appeals was correct in characterizing the events preceding March 2, 1990, as constituting not merely the manifestation of an intention to repudiate the alleged contract, as petitioners contend (Pet. 8-10), but an actual breach of the alleged contract. If the government indeed promised to permit SoCal to utilize supervisory goodwill as alleged, that promise was abrogated by FIRREA. In addition, prior to the statute of limitations cut-off date, the government had issued the regulations mandated by FIRREA, OTS had issued a notice that it intended to apply the regulations to thrifts such as SoCal, and SoCal had evidenced knowledge that supervisory goodwill was no longer available to it by submitting a capital restoration plan to OTS.

FIRREA instructed the Director of the Office of Thrift Supervision to prescribe capital standards in the regulations, including a leverage limit, tangible capital requirement, and risk-based capital requirement. 12 U.S.C. 1464(t)(1)(i)-(iii). FIRREA *mandated* that the leverage limit include a core capital requirement of at least three percent of the institution's total assets and that the minimum *tangible* capital requirement be at least 1.5 percent of the institution's total assets. 12 U.S.C. 1464(t)(2)(A)-(B). FIRREA also provided a definition of "core capital" (which is applicable "[u]nless the Director [of OTS] prescribes a more stringent definition"), 12 U.S.C. 1464(t)(9)(A), of "tangible capital," 12 U.S.C.

1464(t)(9)(C), and of "qualifying supervisory goodwill," 12 U.S.C. 1464(t)(9)(B). According to those definitions, goodwill is not included in "tangible capital" at all. For periods before January 1, 1995, FIRREA did provide a "transition rule" permitting "qualifying supervisory goodwill" to be included in calculating core capital, but it also limited "qualifying supervisory goodwill" to supervisory goodwill that is amortized on a straight line basis over no more than 20 years, and it permitted such goodwill to be included only within the limits of a descending scale of percentages of total assets, the highest of which is 1.5 percent of total assets. 12 U.S.C. 1464(t)(3)(A). Thus, FIRREA precluded counting as core capital any supervisory goodwill that was to be amortized over more than 20 years or in an amount exceeding 1.5 percent of total assets.

The court of appeals correctly held that at least by the conclusion of the enactment of FIRREA, the issuance of the implementing regulations, and OTS's notice of the application of the regulations to thrifts such as SoCal, there was no doubt that the government had prohibited what petitioners contend the government had promised to permit: the utilization of a specified amount of supervisory goodwill, amortized over 25 years, to meet regulatory capital requirements. Petitioners could have had no reasonable belief by that time that they could successfully demand the use of supervisory goodwill as they allege that they had been promised, and they were obligated by that time to conduct their business—and to respect federal regulatory capital requirements—without including supervisory goodwill. Consequently, the court of appeals did not err in holding that by the critical date (six years before they filed suit), there was not merely an intention to repudiate the contract terms; the breach, if any, had occurred.

3. In order to support the dating of the accrual of its claim at or after April 16, 1990, and thus to bring the claim within the six-year statute of limitations, petitioners focus upon OTS's April 18, 1990, approval of the capital restoration plan that SoCal submitted in January and amended in March of 1990. Pet. 5. Petitioners argue (Pet. 12) that FIRREA and the regulations did not immediately mandate non-performance of the alleged contract, because a provision of FIRREA, 12 U.S.C. 1464(t)(8), authorized OTS to grant individual institutions exceptions to the capital requirements. Petitioners, thus, argue that they were not damaged until OTS effectively denied SoCal an exception by imposing the restrictions contained in SoCal's capital restoration plan.

Petitioners' reliance upon FIRREA's exception provision is misplaced. First, as we have demonstrated, FIRREA and the OTS regulations imposed upon SoCal and other thrifts restrictions that conflicted with the alleged contract. Even assuming that SoCal would not have become subject to those restrictions if it had been granted an exception on the day the OTS regulations became effective, it was not granted any such exception. Indeed, implicit in petitioners' argument is the assumption that petitioners' thrift was not obligated to conduct its business in accordance with the law until OTS, the regulatory agency, threatened to (or in fact did) impose sanctions. Neither FIRREA nor any of its implementing regulations, however, could reasonably be read to include any such automatic temporary exception to the new capital requirements.[5]

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[5] It is possible, of course, that SoCal conducted business for some time after the effective date of the OTS regulations *as if* it had been granted an exception, and maintained a capital ratio that fell short of those mandated by FIRREA and the regulations. The fact that SoCal

Second, if SoCal had in fact been granted an exception at some point after the effective date of the regulations, that would only have mitigated the harm from the breach. As the CFC correctly observed, "[a]n exception might be relevant to the mitigation of damages, but does not neutralize the harm that was incurred from the moment of FIRREA's implementation." Pet. App. 32a.

Third, the exception provision permits the granting of exceptions only according to specific criteria, which principally concern the thrift's financial condition at the time OTS considers whether to grant the exception. See 12 U.S.C. 1464(t)(7)(C) & (t)(8). To qualify for an exception or an exemption, SoCal would have had to conduct its business in a manner justifying a determination that an exception "would pose no significant risk to the affected deposit insurance fund," and that there was no "pattern of consistent losses." 12 U.S.C. 1464(t)(7)(C)(i)(I), (ii)(I). The existence of a prior agreement concerning the utilization of goodwill would have no bearing on whether SoCal could have satisfied that test. Therefore, SoCal could not have conducted its business after the enactment of FIRREA upon the assumption that OTS would honor prior agreements by granting exceptions to the statute, and the possibility that SoCal could have obtained an exception on grounds unrelated to the alleged contract has no bearing on when petitioners' claim accrued.

4. Petitioners argue (Pet. 14-15) that the court of appeals' decision conflicts with the decisions in two other cases involving *Winstar*-type claims for breach of contract

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may have been able to continue operating in violation of legal requirements for some time, however, does not mean that those requirements were inapplicable to SoCal during that time. As SoCal's own contemporary actions demonstrated, the alleged right to utilize supervisory goodwill to meet capital requirements was infringed when FIRREA's goodwill provisions became effective.

for failure to permit the continued of supervisory goodwill to satisfy regulatory capital requirements—*Far West Fed. Bank* v. *OTS*, 119 F.3d 1358 (9th Cir. 1997), and *Resolution Trust Corp.* v. *FSLIC*, 25 F.3d 1493 (10th Cir. 1994). Petitioners argue that those cases stand for the proposition that "the Government's announced intention to enforce FIRREA's capital requirements against a thrift constituted anticipatory repudiation, not a breach." Pet. 14. Neither of the cited cases, however, had anything to do with the question of when the breach of contract claim accrued or with any other issue concerning the application of a statute of limitations, and neither decision conflicts with the Federal Circuit's decision in this case.

The court of appeals' statement in *Far West* that when "OTS announced its intention to impose FIRREA regulations on Far West, the government repudiated the Conversion Agreement," 119 F.3d at 1365, was made in response to an argument that the government had not, in fact, repudiated the agreement. *Ibid.* The court did not state or imply that a breach did not occur until OTS announced its intention to take enforcement measures against the thrift, and the court expressly noted that in a prior decision in the case it had "held that FIRREA did abrogate the [agreement]." 119 F.3d at 1363. Moreover, the *Far West* decision did not involve a statute of limitations claim, no issue in *Far West* turned on the date of the breach, and the facts in *Far West* differed from those in this case because of the intervention of a district court injunction that affected the enforcement of FIRREA.

Nor is there any conflict between the Tenth Circuit's decision in *Resolution Trust* and the decision in this case. The Tenth Circuit premised its rejection of the government's sovereign acts defense in *Resolution Trust* on the ground that, in the court's view, OTS retained discretion

even after FIRREA to exempt thrift institutions from sanctions for failure to meet the new regulatory capital requirements until January 1, 1991.[6] The court stated that, in light of that discretion, "OTS's refusal to abide by the contract's supervisory and regulatory goodwill terms constituted a breach of a contract term." 25 F.3d at 1502. The court, however, did not have before it any issue regarding the statute of limitations or the date on which a claim for breach of contract accrued. While its discussion indicated that it believed that OTS's refusal to exercise its discretion constituted a breach of contract, it did not in any sense address when that breach occurred—whether at the time OTS actually imposed sanctions or at some earlier date when the institution knew or should have known that it could no longer use its supervisory goodwill to satisfy regulatory capital requirements. Indeed, the court expressly disavowed any intention to resolve whether a breach had occurred at some earlier date. The court stated that, "[i]f we find * * * agency discretion [not to impose sanctions] here, we need not reach the issue of whether Congress breached these types of assistance agreements in enacting FIRREA." *Id.* at 1501. Because the court (mistakenly, in our view) found such discretion, it did not have to confront whether a breach had occurred upon the enactment or regulatory implementation of FIRREA.

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[6] In our view, the court erred in relying on 12 U.S.C. 1464(t)(8) to conclude that OTS had such broad-ranging discretion. As we note above, see p. 11, *supra*, although 12 U.S.C. 1464(t)(8) granted OTS discretion not to impose sanctions on "eligible savings associations," OTS could exercise that discretion only in carefully limited circumstances, none of which turned on the existence of an agreement regarding supervisory goodwill. See 12 U.S.C. 1464(t)(7)(C).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1998